No. 2207

United States
Circuit Court of Appeals
For the Ninth Circuit.

M. N. WILLIAMSON, Trustee in Bankruptcy of the Estate of GEORGE M. IKEDA, Bankrupt,

Petitioner,

vs.

W. M. RICHARDSON,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress Approved July 1, 1898, to Revise in Matter of Law a Certain Order of the United States District Court for the Northern District of California, First Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the United States Circuit Court of Appeals, Ninth Circuit.

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Petition for Revision.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit:

The petition of M. N. WILLIAMSON respectfully shows that he is a citizen of the United States and of the State of California, and resides in the city of Sacramento, State of California;

That on the 20th day of September, 1909, the above-named George M. Ikeda was duly adjudged a bankrupt by the District Court of the United States for the Northern District of California, and thereafter your petitioner, M. N. Williamson, was duly and regularly appointed trustee in bankruptcy and duly qualified, and is still acting as such trustee;

That heretofore one W. M. Richardson, claiming to be the owner of 357 bales of hops in the possession of your petitioner, M. N. Williamson, as trustee of the above-named bankrupt, filed a petition in said bankruptcy proceeding, claiming to be the owner of said 357 bales of hops and demanding possession thereof;

That the title to said 357 bales of hops at the time of adjudication in bankruptcy was in the above-named George M. Ikeda, and ever since said time has been and now is the property of said bankrupt estate;

That after the filing of said petition by said W. M. Richardson claiming to own said hops, an application

was made before J. F. Pullen, Esq., one of the referees in bankruptcy, in the District Court of the United States for the Northern District of California, to compel the surrender of said 357 bales of hops to said W. M. Richardson, which application was thereafter denied by said referee:

A certificate of review was thereafter granted to the District Court of the United States for the Northern District of California, by the said referee upon the denial of the said application, and on or about the 13th day of June, 1912, an order was entered by the said District Court reversing the order made by said referee as to 216 bales of said hops and affirming said order as to the remaining 141 bales of said hops.

A copy of the Return and Report and Findings of the referee containing the pleadings and evidence on which the matter was submitted is hereto attached, marked Exhibit "A," and by reference thereto made a part hereof.

A copy of the Petition for Review of said referee's order is hereto attached, marked Exhibit "B," and by reference thereto made a part hereof.

A copy of said order of the District Court reversing said referee as to 216 bales of hops is hereto attached, marked Exhibit "C," and by reference thereto made a part hereof.

Said order of said District Court as to said 216 bales of hops was and is erroneous as a matter of law, in that,

1. Your petitioner, M. N. Williamson, as trustee of the estate of George M. Ikeda, a bankrupt, was and

is entitled to said 357 bales of hops, as a matter of law;

2. The legal title to said 357 bales of hops was vested in the said George M. Ikeda at the time of the adjudication of the said George M. Ikeda as a bankrupt.

3. The evidence shows as a matter of law that none of said 357 bales of hops were ever delivered to W. M. Richardson.

4. Under the statutes of the State of California, upon which your petitioner relied to defeat the claim of W. M. Richardson, the said W. M. Richardson is without right to assert title to the said 357 bales of hops, or any of them.

WHEREFORE, your petitioner, feeling aggrieved because of said order, asks that the same may be revised in matters of law by this Honorable Court as provided in section 24B of the Bankruptcy Act and rules of practice in such cases provided, and that the same be reversed as to said 216 bales of hops, and for such other and further relief as may be just and proper.

Dated December 10th, 1912.

M. N. WILLIAMSON,
Petitioner.

DEVLIN & DEVLIN,
Attorneys for Petitioner.

State of California,
County of Sacramento,
City of Sacramento,—ss.

I, M. N. Williamson, the petitioner mentioned and described in the foregoing petition, do hereby make

solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

M. N. WILLIAMSON.

Subscribed and sworn to before me this 10th day of December, 1912.

[Seal] S. W. DOWNEY,

Notary Public in and for the County of Sacramento, State of California.

In the District Court of the United States in and for the Northern District of California, First Division.

No. 6307.

In the Matter of GEORGE M. IKEDA,

In Bankruptcy.

Praecipe for Transcript of Record on Petition for Revision.

To the Clerk of the Above-entitled Court:

You will please prepare and certify transcript for use on Petition for Revision of M. N. Williamson to the United States Circuit Court of Appeals for the Ninth Circuit from the decision of the above Court entered June 13, 1912, consisting of the following files, records and papers in the above-entitled cause:

1. This Praecipe.
2. Return and Report and Findings of Referee.
3. Petition for Review of Referee's Order.
4. Memorandum Opinion Reversing Referee's Order.

5. Order of Court Reversing Referee.

DEVLIN & DEVLIN,
Attorneys for M. N. Williamson.

[Endorsed]: Filed December 12, 1912. W. B. Maling, Clerk. [1*]

Exhibit "A."

"In the District Court of the United States for the Northern District of California.

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Return and Report and Findings of Referee.

On the —— day of October, 1909, W. M. Richardson filed with the Referee in Bankruptcy a petition asking that three hundred and fifty-seven (357) bales of hops in possession of the trustee of the above-named bankrupt be delivered to him. This petition alleged that the said W. M. Richardson was the owner of said hops. The petition was filed originally with the Referee in Bankruptcy, without having been referred to him by order of Court, and is in the words and figures following, to wit:

"In the District Court of the United States for the Northern District of California.

No. 6307.

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Petition for Possession of Personal Property.

To the Honorable J. J. DE HAVEN, Judge of the District Court:

*Page-number appearing at foot of page of original certified Record.

The petition of W. M. Richardson respectfully shows:

1. That the petition of the bankrupt above named was filed in this court on the 20th day of September, 1909, and thereafter, on said day, the said George M. Ikeda was duly adjudged a bankrupt.

2. That on the 3d day of March, 1909, your petitioner and said George M. Ikeda entered into a contract, by the terms of which your petitioner agreed to buy and said George M. Ikeda [2] agreed to sell to your petitioner 80,000 pounds of hops grown during the year 1909, and the product of that certain piece or parcel of land situate in the county of Sutter, State of California, and particularly described as follows, to wit: Consisting of about 65 acres commonly known as the 'Rideout Ranch' and leased by said George M. Ikeda. That by the terms of said agreement your petitioner was to pay therefor the sum of 8¢ per pound upon the delivery of said hops.

3. That said contract provided that your petitioner should make advance payments on said crop of hops on certain dates in said contract specified. That petitioner paid to said Ikeda prior to the filing herein of the petition in bankruptcy all of the sums specified in said contract as advance payments as well as certain additional sums on the purchase price of said hops, requested by said bankrupt prior to the filing of his petition in said bankruptcy. That it was provided by said contract that all payments made by said petitioner to said bankrupt on the purchase price of said hops prior to date of delivery should bear interest at the rate of 6% per annum.

That the total of said advance payments and of payments made on the purchase price of said hops, with interest thereon as provided in said contract, amounted to the sum of $5,397.75 on the date of the filing of the petition in bankruptcy in the above-entitled matter.

4. That prior to the 20th day of September, 1909, your petitioner, in accordance with the terms of said contract, inspected and accepted all the hops of said bankrupt grown on the premises which had been baled at the date of said inspection. That all of the hops so inspected and baled amounted to 216 bales and were of the weight of 42,357 pounds; that at the date of said acceptance, petitioner had paid on the purchase price of said hops the sum of $5,397.75. That petitioner at the time of said [3] acceptance marked all of said 216 bales with a stencil as follows:

'C. S. MAY & CO., ALBANY, NEW YORK.'

That said C. S. May & Co. were consignees to whom your petitioner was shipping said hops; that said 216 bales were all of said hops that had been baled at the time of said inspection and acceptance.

5. That thereafter and before September 20, 1909, all of the hops grown by said bankrupt on the above-described real property were baled by said bankrupt and weighed and accepted by your petitioner. That all of said hops baled amounted to 357 bales, including said 216 bales theretofore baled and accepted.

6. That thereafter petitioner removed all of said 357 bales of hops from said Rideout Ranch and hauled the same to the railroad station at Chandler, Sutter County, California, and had loaded a portion

thereof on cars of the railroad company. That M. N. Williamson, as receiver appointed by the court in the above-entitled matter, then and there demanded said hops, and against the will of petitioner took possession of the same from petitioner and retained possession thereof until his appointment as trustee as hereinafter set forth.

7. That on the 5th day of October, 1909, said M. N. Williamson was duly elected trustee in said matter, and on the 14th day of October, 1909, he duly qualified as such trustee, and ever since has been and now is the duly elected, qualified and acting trustee in the above-entitled matter. That said trustee thereupon took possession of said 357 bales of hops, and ever since has been and now is in possession thereof.

8. That petitioner has demanded of said trustee the delivery of said hops to petitioner, but said trustee refuses, and still does refuse, to surrender the possession of the same or of any part thereof. [4]

9. That said hops are of the total weight of 70,020 pounds, and the price thereof, at the rate fixed by said contract, is the sum of $5,601.60. That there is a balance due on said hops from your petitioner to said bankrupt amounting to the sum of $203.85. That at the time said demand was made on said trustee as hereinbefore set forth, your petitioner tendered to said trustee in legal money of the United States said sum of $203.85.

WHEREFORE, your petitioner prays judgment against said bankrupt and said trustee for the possession and return to petitioner of said 357 bales of hops upon the payment by your petitioner to said

trustee of the sum of $203.85, being the balance due from your petitioner to said bankrupt on the date of the filing of the petition in bankruptcy herein, and for such other and further relief as to the Court may seem meet and equitable.

W. M. RICHARDSON,
By WHITE, MILLER & McLAUGHLIN,
His Attorneys.

State of California,
County of Sacramento,—ss.

W. M. Richardson, being duly sworn, says: That he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the matters therein stated are true.

W. M. RICHARDSON.

Subscribed and sworn to before me this 21st day of October, 1909.

[Seal] IRVING NEEDHAM,
Notary Public in and for the County of Sacramento, State of California." [5]

On the 5th day of November, 1909, the trustee of the above-named bankrupt, to wit, M. N. Williamson, filed an answer to the above petition of claimant denying the material allegations of the petition and alleging that the above bankrupt estate was the owner and entitled to the possession of said 357 bales of hops. This answer is in the words and figures following, to wit:

"In the District Court of the United States for the Northern District of California.

No. 6307.

In the Matter of GEORGE M. IKEDA,
Bankrupt.

Answer of Trustee to Petition for Possession of Personal Property.

Now comes M. N. Williamson, trustee in bankruptcy in the above-entitled matter, and answering the petition of W. M. Richardson admits, denies and avers as follows:

I.

Admits that the petition of the bankrupt above named was filed in this court on the 20th day of September, 1909, and thereafter on said day said George M. Ikeda was duly adjudged a bankrupt.

II.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 2 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 2 of said petition.

III.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 3 of the petition above referred to, and [6] therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 3 of said petition.

IV.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 4 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 4 of said petition.

V.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 5 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 5 of said petition.

VI.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 6 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 6 of said petition.

VII.

Admits that on the 5th day of October, 1909, said M. N. Williamson was duly elected trustee in said matter, and on the 14th day of October, 1909, he duly qualified as such trustee, and ever since has been and now is the duly qualified and acting trustee in the above matter.

Denies that said trustee thereupon took possession of said 357 bales of hops, and ever since has been and

now is in the possession of and in that connection avers that he received [7] possession of said hops from C. T. Elliott, United States Marshal, receiver in the above-entitled action, by delivery of warehouse receipts covering said hops on or about the 26th day of October, 1909.

VIII.

Avers that he has no knowledge, information or belief upon the subject sufficient to enable him to answer the allegations contained in paragraph 9 of the petition above referred to, and therefore placing his denial upon that ground denies each and every allegation contained in said paragraph 9 of said petition.

WHEREFORE, respondent prays that the prayer of said petition be denied and that he have such other relief in the premises as to this Court may seem meet and proper.

M. N. WILLIAMSON.

State of California,
County of Sacramento,—ss.

M. N. Williamson, being duly sworn, deposes and says that he is the respondent in the above-entitled proceeding; that he has read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to those matters he believes it to be true.

M. N. WILLIAMSON.

Subscribed and sworn to before me this 4th day of November, 1909.

[Seal] C. H. S. BIDWELL,

Notary Public in and for the County of Sacramento, State of California." [8]

The matter came on for hearing before the undersigned Referee in Bankruptcy on the 17th day of December, 1909, without previous reference to him by order of Court. Evidence was adduced by said W. M. Richardson in support of the above petition and by M. N. Williamson, as trustee in bankruptcy, in opposition to said petition.

From the evidence it appears:

1. That claimant Richardson bases his claim to the hops upon a contract dated March 3d, 1909; said contract is in the words and figures following, to wit:

"THIS AGREEMENT, made this 3d day of March, 1909, between GEORGE M. IKEDA of the County of Sacramento, State of California, the party of the first part, and W. M. RICHARDSON of Santa Rosa, State of California, the party of the second part,

WITNESSETH: That the party of the first part hereby covenants and agrees to deliver to the party of the second part Eighty Thousand pounds (80,000) pounds net of hops grown during the year 1909, and the product of that certain piece or parcel of land situate in said County of Sutter, State of California, and particularly described as follows; to wit—

Consisting of about Sixty-five (65) acres commonly known as the Rideout Ranch, and leased by George M. Ikeda.

The said hops are to be delivered, as aforesaid, in sound condition, good color, fully matured, cleanly picked, well dried, and cured and put up in good merchantable order and condition in bales weighing about one hundred and eighty-five pounds each (five pounds tare per bale to be allowed).

Said hops are to be delivered at the Station at the Rideout Ranch R. R. Depot in the City of ————, not later than the 1st day of October, 1909, and at the time of delivery must be free and clear of all liens, and encumbrances of every kind, [9] including labor employed in their harvest and preparation for market.

Said first party further agrees that at least ten (10) days before he is ready to deliver said hops he will give to said second party notice in writing of the time when such delivery will be made by mailing in the U. S. Mails to said agent of said second part, at said City of Santa Rosa such written notice addressed to said second party or his agent at Santa Rosa, California. And when said hops are so tendered for delivery they may be inspected by said second party or agent. Said second party or agent shall also at any given time after the execution of this agreement have full and free access to and upon said described premises and shall also have the privilege of obtaining samples of said hops ten days before said hops are to be delivered.

In consideration of the covenants of the first party herein contained the said second party agrees to pay to said first party for said hops that are up to the requirements of this contract the sum of (8¢) Eight

cents per pound upon the delivery thereof. And should there be a dispute or difference of opinion between the party of the first part, and the party of the second part, as to whether said hops are up to the requirements of this contract, such difference shall be decided by two competent persons, one selected by the party of the first part, and one selected by the party of the second part, with power to choose an umpire if they do not agree, and their decision shall be conclusive and final.

Such arbitrators shall be men experienced in the cultivation and curing of hops in California.

And to enable said first party to cultivate, harvest and prepare said hops for delivery, as aforesaid, said second party [10] further agrees to advance to said first party during the year of this contract, if said first party so requests, the following sums of money, to wit: $500.00 on the 4th day of March, 1909, for cultivating purposes; $900.00 on the 1st day of April, $400.00 1st day of May, $400.00 on the 1st day of June, $400.00 1st July, and balance $1,400.00 for picking 15th day of August.

All of said moneys so advanced shall, at the time of the delivery of said hops, constitute and be deemed as part payment upon the purchase price thereof.

And said sums of money so advanced as aforesaid, shall bear interest from the date when the same are made, and up to the time of delivery of said hops upon which such advances are made, at the rate of 6% per annum. Provided, that in the event that said hops are not delivered in accordance with the provisions of this contract, then such advances shall

be repayable by the said first party to said party at the time when such delivery should have been made, and the repayment of such sums and all other obligations of said first party under this contract are secured by a mortgage lien in favor of said second party upon said hops; and this instrument shall and does constitute such mortgage upon said hops in favor of said second party, for the purposes aforesaid, and shall stand as such mortgage and as a contract for the sale of such portion of said hops as are necessary to reimburse said second party for all sums of money so due to said second party under this contract. If, however, during the year of this contract, the growing crops herein referred to are not in such conditions at the proper season to produce the quantity and quality of hops above specified and agreed upon, then said second party may give notice in writing to said first party that he will not make any advances or further advances to said first party, and in such event said [11] party shall be discharged from any obligation to make any advance of any money, and if any advances have been made, the same shall be repayable when the above facts are ascertained.

And should there be a dispute or difference of opinion between the party of the first part and the party of the second part, as to whether the growing crops herein referred to are not in such condition at the proper season to produce the quantity and quality of hops above specified and agreed upon, such difference shall be decided by two competent persons, one selected by the party of the first part, and one selected

by the party of the second part, with power to choose an umpire if they do not agree, and their decision shall be conclusive and final. Such arbitrators shall be men experienced in the cultivation, growing and curing of hops in California.

Said first party further agrees to keep insured with good and solvent Insurance Companies of well established reputation for solvency his hop houses on said premises, or said hops, such insurance to be in the name and favor of the party of the second part to cover in full all advances immediately when made by the party of the second part to the party of the first part. And if said first party fails or neglects such insurance as aforesaid, then said second party may procure the same and advance any premiums necessary to be paid, which advances shall be repayable to said second party by said first party, and shall bear interest at the rate of 6 per cent per annum. And in the event of loss by fire of said hop houses, or said hops, said second party shall have the right to collect from the said Insurance Companies having the risks, such amounts as may then be due from said first party, to said second party, by reason of any advances made under this contract, and said first party hereby constitutes said second party his agent for such purposes. [12]

All moneys payable hereunder shall be payable in United States Gold Coin, or its equivalent.

IN WITNESS WHEREOF, the said parties hereunto have hereto set their hands and seals the day

and year first above written.

GEO. M. IKEDA. [Seal]
W. M. RICHARDSON. [Seal]

WITNESS:
OTTO J. KOCH.

State of California,
County of Sacramento,—ss.

George M. Ikeda the Mortgagor in the foregoing Mortgage named, being duly sworn, for himself doth depose and say: That the aforesaid mortgage is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

GEORGE M. IKEDA.

Subscribed and sworn to before me this 3d day of March, 1909, at Sacramento, County of Sacramento.

[Seal] CHARLES O. BUSICK,
Notary Public.

State of California,
County of Sacramento,—ss.

On this 3d day of March in the year 1909, before me, Charles O. Busick, a Notary Public, in and for said County of Sacramento, duly commissioned and sworn, personally appeared Geo. M. Ikeda and W. M. Richardson known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

CHARLES O. BUSICK,
Notary Public in and for the County of Sacramento, State of California." [13]

2. That in pursuance to the contract above set forth Richardson advanced sums of money therein

set forth to Ikeda, and that from time to time his representative visited the Rideout Ranch and inspected the growing of the crops, and the methods of farming employed.

The evidence further shows that all the money agreed to be paid for the hops has never been paid, but that after the adjudication in bankruptcy a tender as to what Richardson claims is still due on the hops was made, but refused.

3. The evidence of Otto J. Koch, principal witness of claimant Richardson shows that on the 28th day of August, 1909, Mr. Koch and Mr. Richardson went up to the ranch of George M. Ikeda. At that time there were 216 bales of hops. The remainder of the crop consisting of 141 bales was in various stages of cultivation. Some of the hops were unpicked and still growing; others were uncured.

Richardson and Koch made an inspection of the hops which were then in the bale and branded some of them with the names of Charles H. May & Company.

4. At three o'clock in the afternoon of said 28th day of August, 1909, Richardson and his agent, Koch, left the Rideout Ranch. It was the understanding at that time that they should return on the following Monday, and that some of the bales of hops at that time should be hauled to the Rideout Station by Ikeda.

5. Just before leaving the Rideout Ranch, certain employees of Ikeda were left in charge of the hops. Mr. Koch testified that Mr. Richardson asked Mr. Dent to look out for the hops.

Mr. Koch testified on this subject:

"Q. But he (Mr. Dent) was a workman employed for Mr. [14] Ikeda? A. Yes, sir.

Q. White man?

A. Yes, sir; he was going to quit up there.

Q. Yes, but he was an employee of Mr. Ikeda, was he not? A. Yes, sir.

Q. Did you pay him anything?

A. Paid him for Mr. Ikeda, yes, sir.

Q. No, but did you pay him anything to see after your interest? A. Did I pay him anything?

Q. Yes, sir. A. No, sir, I did not.

Q. Did Mr. Richardson pay him anything?

A. I couldn't say; I don't think he did.

Q. He was simply one of Mr. Ikeda's employees, was he not? A. Yes, sir."

Further testimony of Mr. Koch:

"Q. When you and Mr. Richardson went over, your intention was to inspect the hops as you have testified, and then go back on Monday and haul them from the ranch to the depot; is that right?

A. Well, we never,—

Q. Interrupting: Have them hauled?

A. Yes, sir,—well, we won't haul them. It is the grower's place to haul the hops.

Q. Well, I do not care about that. Right there, when you and Mr. Richardson were there on Saturday, August 28th, you went through this process of examining and inspecting the hops?

A. Yes, sir. [15]

Q. And after you got on the ranch, it was the intention of yourself and Mr. Richardson to go back

on the place Monday or Tuesday to look after the hops? A. No, not on Mr. Richardson's.

Q. On your part? A. On my part, yes, sir.

Q. As a representative of Mr. Richardson; you were not going for yourself?

A. No, no; Mr. Richardson.

Q. Then, you state that conversation took place on the ranch when Mr. Ikeda said he would haul the hops? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And then, you intended to,—did you intend to come back, then, on Monday, or not?

A. I was going to come back, yes, on Monday."

6. On the 30th of August, 1909, the hops were attached by creditors of Ikeda, prior to the return of any agent of Richardson to haul the hops from the ranch.

7. The hops remained under attachment until the 22d day of September, 1909, when they were released by the sheriff.

Further testimony of Koch:

"Q. (By Judge McLaughlin.) Now, the hops remained under attachment until when?

A. September 22d.

Q. September 22d? A. Yes, sir."

8. On the 20th day of September, 1909, Ikeda was adjudged a bankrupt by the United States District Court. [16]

9. On September 23d, 1909, after adjudication in bankruptcy, Koch, as agent of Richardson, went up to the ranch of Ikeda, seized all the hops then upon the premises, amounting at that time to 357 bales, and

attempted to haul them to the Rideout Station, and ship them out of the State. Before this could be done, however, they were seized by the United States Marshal, acting under orders of the United States Court; subsequently, they were turned over to the Trustee in Bankruptcy.

10. While the contract on which claimant bases his claim above set forth *re*ports in some respect to be a chattel mortgage, it fails to contain the proper affidavit, as required by the Statutes of California, and counsel, therefore, bases his right to the hops, not by reason of any purported lien created by this contract as a mortgage, but by reason of the alleged delivery of the hops, in accordance with the contract.

After careful consideration of all the testimony in the case and a careful consideration of the elaborate briefs filed by attorneys for claimant and of the trustee, I am of the opinion that:

I.

That said *R.* M. Richardson is not now, and never has been, the owner of all or any of the 357 bales of hops prayed for in his petition, and he has never been the owner or entitled to the possession of all or any of said hops, and that he has at no time had any right, title or interest in, or to any of said hops, but that said bales of hops, and each and every one of them, up to the adjudication of bankruptcy of the above-named George M. Ikeda, were the property of said George M. Ikeda, and that subsequent to the adjudication of said George M. Ikeda in bankruptcy, and up to the time when said hops were heretofore sold under the order of this Court, said bales of [17]

hops, and each and every one of them, were the sole and exclusive property of the above-named bankrupt's estate, and all the right, title and interest to and in said hops, and each and every bale of them, belonged to said estate and the trustee in bankruptcy, M. N. Williamson, as trustee of said estate, was lawfully entitled to the sole and exclusive possession of them and each of them.

The referee further finds that the trustee of the above-named bankrupt does not now have, and never has had, in his possession or control as such trustee, any property or hops of said claimant Richardson, and that said Richardson does not now have, and never has had, any right, title or interest to or in any property or hops in possession or control of the trustee of the above-named bankrupt.

The referee further finds that the proceeds derived from the sale heretofore made of 357 bales of hops in possession of the trustee of the above-named bankrupt belongs to and is the exclusive property of the above-named bankrupt estate, and that said claimant, *R.* M. Richardson, does not now have, and never had, any property right, or any right, title or interest whatsoever to or in said proceeds or any portion thereof.

II.

The referee finds that the allegation in said claimant's, Richardson, petition that 216 bales of hops were accepted on the 28th day of August, 1909, by said *R.* M. Richardson is untrue, and in this connection referee finds that at no time were any hops accepted by said claimant, *R.* M. Richardson, and

referee further finds that possession of all the hops grown on said "Rideout Ranch," to wit, 357 bales, remained in the complete and exclusive possession of said George M. Ikeda up to the 30th day of August, 1909, on which day said 357 bales of hops were attached [18] by certain creditors of George M. Ikeda; that from the 30th day of August, 1909, until the 22d day of September, 1909, said 357 bales of hops were in the possession of the sheriff of Sutter County under said attachment; that on the 20th day of September, 1909, said George M. Ikeda was duly and regularly adjudicated a bankrupt by the above-named court, and at said time M. N. Williamson was appointed receiver to take possession of said hops as property of the bankrupt's estate; that on the 23d day of September, 1909, and subsequent to the adjudication in bankruptcy of George M. Ikeda and the appointment of M. N. Williamson as receiver to take possession of the property of said bankrupt, said hops were seized wrongfully and without right by said claimant, *R.* M. Richardson, and hauled to the railroad station at Chandler, Sutter County, California; that subsequent thereto, and on the 23d day of September, 1909, an order of the above-named court was made substituting United States Marshal C. A. Elliott, as receiver of said bankrupt's property, in place of M. N. Williamson, and that thereupon said United States Marshal went to Chandler Station and took possession of said hops; that on the 5th day of October, 1909, said M. N. Williamson was duly elected trustee of the above-named bankrupt, and he duly qualified as such

trustee, and ever since has been, and now is, the duly elected, qualified and acting trustee of said bankrupt, and that thereupon he took possession of said 357 bales of hops and remained in possession of the same until said hops were sold by decree of this Honorable Court.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts, referee finds that the prayer of claimant's petition for the possession and return of said 357 bales of hops should be denied, and that **[19]** said claimant, *R.* M. Richardson, has no right, title or interest to or in any of said hops; that he has no right to any money arising from the sale thereof, and that said 357 bales of hops at the time of the sale thereof, by order of this Court, were the exclusive property of the above-named bankrupt's estate, and that the money derived from the sale thereof is now the property of said estate.

Dated April 5, 1912.

J. F. PULLEN,

Referee in Bankruptcy in and for the Counties of Sacramento, Yolo, Amador and El Dorado.

[Endorsed]: At 10 o'clock and 3 min. A. M. Filed May 16, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. **[20]**

Exhibit "B."

In the District Court of the United States in and for the Northern District of California.

In the Matter of GEORGE M. IKEDA,

Bankrupt.

Petition for Review of Referee's Order.

To J. F. PULLEN, Esq., Referee in Bankruptcy:

The petition of W. M. Richardson respectfully shows that your petitioner heretofore filed herein a petition to have certain personal property, to wit, 357 bales of hops claimed by the trustee of said bankrupt and delivered by the U. S. Marshal to said trustee, delivered to claimant on the ground that title to said hops had passed to claimant prior to the adjudication in bankruptcy.

That thereafter a hearing of said petition was had after due and legal notice thereof and oral and documentary evidence introduced at said hearing; that thereupon said matter and said petition was taken under advisement.

That thereafter and on the —— day of April, 1912, an order was made by said J. F. Pullen, as such referee, which said order was made and entered herein denying the right of your petitioner as such claimant to said 357 bales of hops and to any part thereof; that such order was and is unsupported by the evidence introduced at said hearing and is contrary to law in this, to wit:

I.

That title had passed to your petitioner of such portion of said hops as had been accepted and branded by your petitioner prior to the filing of the

petition in bankruptcy [21] herein.

II.

The petitioner is entitled to recover of the bankrupt and of his trustees in bankruptcy such portion of said hops as had been actually paid for by petitioner according to the terms of the contract entered into between the petitioner and said bankrupt prior to the filing of said bankrupt's petition to be adjudicated a bankrupt.

III.

That said petitioner is entitled to such portion of said hops as had not been paid for as aforesaid on tendering to the trustee in bankruptcy the balance due thereon under the terms of said contract.

WHEREFORE your petitioner prays that said order may be reviewed as provided in General Order in Bankruptcy No. 27.

Dated April 22d, 1912.

WHITE, MILLER & McLAUGHLIN. [22]

State of California,
County of Sacramento,—ss.

Irving Needham, being duly sworn, deposes and says that he is one of the attorneys for petitioner and claimant in the above-entitled proceedings, and as such attorney is familiar with the facts above set forth; that said petitioner and claimant is not a resident of the county of Sacramento, where affiant has his offices and said petitioner and claimant is now absent from said county of Sacramento; that affiant makes this affidavit for and on behalf of said petitioner, and makes solemn oath that the state-

ment of facts in the foregoing petition contained are true according to the best of his knowledge, information and belief.

IRVING NEEDHAM.

Subscribed and sworn to before me this 23d day of April, 1912.

[Seal] IDA B. STOCKER,

Notary Public in and for the County of Sacramento, State of California.

Receipt of copy admitted this 23d day of April, 1912.

DEVLIN & DEVLIN,
Attorneys for Trustee.

[Endorsed]: Filed April 23d, 1912, at 4:30 P. M. J. F. Pullen, Referee. **[23]**

Exhibit "C."

[Memorandum Opinion.]

In the District Court of the United States, for the Northern District of California, First Division.

No. 6307.

In the Matter of GEO. M. IKEDA,

In Bankruptcy.

This is a petition to review an order made by the referee which determined that the title of 357 bales of hops was in the trustee of the estate in bankruptcy, and denied the petition of the claimant, W. M. Richardson, for an order directing the trustee to restore to him the possession thereof.

Upon consideration of the evidence and the elaborate briefs filed by the attorneys for the respective

parties, my conclusion is that the legal title to 216 bales of the hops in controversy was vested in the claimant Richardson on August 28th, 1909, and that he was the owner thereof at the date of the adjudication in bankruptcy, and that the title to the remaining 141 bales is in the trustee.

The order of the referee is reversed as to the 216 bales of hops, owned by the petitioner, and affirmed as to the remaining 141 bales.

Dated June 13th, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Jun. 13, 1912, at 9 o'clock and 50 minutes A. M. Jas. P. Brown, Clerk. By Francis Krull. **[24]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 13th day of June, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

#6307.

In re GEO. M. IKEDA,

In Bankruptcy.

[Order Reversing Order of Referee in Bankruptcy.]

The petition for a review of the order of the referee made herein having been heretofore submitted to the Court for decision, now, after due consideration had, the Court files its written memo-

randum, and by the Court ordered that said order be, and the same is hereby, reversed as to the 216 bales of hops owned by the petitioner and affirmed as to the remaining 141 bales. **[25]**

In the District Court of the United States in and for the Northern District of California, First Division.

No. 6307.

In the Matter of GEORGE M. IKEDA,

In Bankruptcy.

Clerk's Certificate to Transcript of Record.

United States of America,
Northern District of California,—ss.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing twenty-five (25) typewritten pages, numbered from 1 to 25, inclusive, to be a full, true and correct copy of the Record and Proceedings in the above and therein entitled cause as is called for by the praecipe of the attorneys for M. N. Williamson, petitioner in the above-entitled cause, as the same remain of record and on file in the office of the Clerk of said Court; and that the same constitute the record on Petition for Revision herein from the order dated June 13, 1912, of the District Court of the United States for the Northern District of California, First Division, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that the cost of preparing the foregoing record on appeal is the sum of $13.90 and that

the said sum has been paid to me by Devlin & Devlin, Esqrs., attorneys for M. N. Williamson, petitioner herein. **[26]**

In testimony whereof, I have hereunto set my hand and affixed the seal of the said District Court this 12th day of December, 1912.

[Seal] WALTER B. MALING.
Clerk. **[27]**

[Endorsed]: No. 2207. United States Circuit Court of Appeals for the Ninth Circuit. M. N. Williamson, Trustee in Bankruptcy of the Estate of George M. Ikeda, Bankrupt, Petitioner, vs. W. M. Richardson, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Northern District of California, First Division.

Filed December 12, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2207

UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

M. N. WILLIAMSON, Trustee in Bankruptcy of the Estate of George M. Ikeda, Bankrupt,

Petitioner.

vs.

W. M. RICHARDSON,

Respondent.

Petitioner's Points and Authorities.

The proceeding before the Court is a petition under Section 24b of the Bankruptcy Act to revise, in matter of law, an order of the United States District Court for the Northern District of California, First Division, reversing in part an order and judgment of the referee in bankruptcy, adjudging certain personal property to be vested in the trustee of the estate of the bankrupt.

STATEMENT OF THE CASE.

George M. Ikeda was adjudicated a bankrupt on the 20th day of September, 1909. M. N. Williamson was appointed receiver and subsequently elected trustee of the estate of the bankrupt.

At the time of the adjudication the bankrupt was engaged in the business of raising hops in the County

of Sutter, State of California, and at that time some 357 bales of hops had been cured, remaining still on the place, some were in the process of curing and some remained on the vines unpicked.

A short time prior to the adjudication of bankruptcy, several attachments had been levied on the hops, and these were not released until after the adjudication.

The 357 bales of hops subsequently came into the hands of the trustee, and the controversy now before the Court is in regard to these 357 bales.

Richardson, claiming to be the owner of the 357 bales of hops, filed a petition before the referee praying an order that the trustee be directed to turn them over to him. After a hearing the referee decided that the trustee had the title to the whole 357 bales and denied the petition. The petitioner, Richardson, prayed a review of the finding of the referee by the District Court, and, after a hearing, his Honor, Judge De Haven, reversed the order of the referee as to 216 bales of the hops and affirmed it as to the balance; that is, he found Richardson was entitled to 216 bales and the trustee the balance. We regret that Judge De Haven did not write an opinion. He merely made a memorandum or minute order.

SPECIFICATION OF ERRORS RELIED UPON.

Your petitioner most respectfully contends and submits that taking the record and the testimony and placing any possible construction thereon, that

most unfavorable to him, the order of the District Court is erroneous as a matter of law in that:

I.

Your petitioner, as trustee of the estate of George M. Ikeda, a bankrupt, was at all times since his election and qualification as such trustee, and is now entitled to the possession, and held and holds the title to all of the said 357 bales of hops, as a matter of law.

II.

That the legal title to and right of possession of all of the said 357 bales of hops was in the said George M. Ikeda at the time he was adjudicated a bankrupt, and hence vested in your petitioner as trustee of the estate of the said bankrupt, as a matter of law.

III.

That the evidence shows, as a matter of law, that no part of the said 357 bales of hops was ever delivered to the said claimant, Richardson, prior to the adjudication of the bankruptcy of Ikeda.

IV.

That under the statutes of the State of California the said claimant Richardson is, as a matter of law, without right to assert title to the said 357 bales of hops, or to 216 bales thereof, or to any part thereof.

ARGUMENT, POINTS AND AUTHORITIES.

The respondent, Richardson, bases his claim upon an agreement between himself and the bankrupt, made March 3d, 1909 (set out in full at pp. 13-18 of the petition for revision), whereby the bankrupt agrees *to deliver* to Richardson 80,000 pounds of hops *to be grown during the year 1909*, at the Rideout Ranch R. R. depot. Richardson is given right of inspection, and if hops are up to standard, is to pay Ikeda (the bankrupt) eight cents per pound *upon delivery*. Richardson agreed to make various advances as the season progressed, which were to bear interest at 6 per cent and be considered as part payment for the hops in case of their acceptance, but if the hops were not accepted to be repayable with interest to Richardson.

Richardson did advance certain moneys, but had not paid all due for the hops at the time of the adjudication (pp. 18-19).

On August 28th, 1909, Richardson and his agent visited the ranch, inspected the hops and marked or branded 216 bales "Charles H. May & Company" (p. 19), and agreed to return and take those hops on the following Monday (p. 19). The 216 bales remained in the possession of Ikeda the same as before the branding, nothing else being done towards Richardson's taking possession (pp. 19-21).

Prior to the return of Richardson's agent, to-wit, on August 30th, 1909, the hops, including the 216 bales, were attached by the Sheriff of Sutter County,

and remained under attachment until after the adjudication of bankruptcy.

The respondent claims that as matter of law the foregoing transactions vested him with the title and right of possession of all the hops, and the District Court held they invested him with the title and right of possession of the 216 bales branded. Your petitioner claims the contrary, and that is the question now before this Court.

THE TITLE TO THE HOPS VESTED IN THE TRUSTEE.

The agreement between Richardson and Ikeda was simply an executory agreement to sell hops at some future time. It contemplated a delivery subsequent to the time they should be grown, cured and baled.

Richardson *agrees to pay upon delivery.* He has a right of rejection. Delivery is to be made at the railroad station. The moneys Richardson advanced were *at the time of the delivery of said hops* to be deemed part payment of the purchase price. If the hops were not delivered Richardson was to be repaid the advances with interest.

Did this agreement and the subsequent advances constitute a sale of the hops? Was it sufficient to vest in Richardson the title to or right of possession of the hops when grown, cured and baled? The answer to these questions must be found in the laws of California.

Manifestly under the Code provisions, and the cases cited in support thereof, such a contract creates only an agreement to sell, and does not transfer possession or a right to possession of the property after it shall come into existence.

Section 1661 of the California Civil Code provides:

> "An executed contract is one, the subject of which is fully performed. All other are executory."

Section 1721 of the Civil Code provides:

> "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."

Section 1726 of the Civil Code provides:

> "An agreement for sale is either: 1. An agreement to sell; 2. An agreement to buy; or 3. A mutual agreement to sell and buy."

Section 1727 of the Civil Code provides:

> "An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing."

Section 1728 of the Civil Code provides:

> "An agreement to buy is a contract by which one engages to accept from another, and pay a price for the title to a certain thing."

Section 1729 of the Civil Code provides:

> "An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor."

Section 1730 of the Civil Code provides:

> "Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not."

Under this Section, it is clear that property not in existence cannot be *sold*, but only the subject of *an agreement to sell.*

Section 1141 of the Civil Code provides:

> "Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, in the manner prescribed by the chapter upon offer of performance."

Section 1722 of the Civil Code provides:

> "The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer."

Under this section, of course, the hops here in controversy could not be the subject matter of sale, as they were not in existence when the contract was made.

Under the above cited provisions, the contract in

question is merely an executory contract; an agreement to sell hops. It is not an executed contract; it is not a sale.

The relation of the parties, created by the agreement was then: (1) That of prospective buyer and seller; (2) That of debtor and creditor. Under neither of these relations did the respondent obtain either title to, or the right of possession of, the hops.

A MERE EXECUTORY AGREEMENT.

The contract being merely an executory agreement for the purchase and sale of personal property, the prospective purchaser obtains no title until possession has actually been taken by him, and especially so in the case of property not yet *in esse.* He acquires no lien on any specific property; the relation is purely contractual.

Gibbs v. Rainard, 86 Cal., 532;
Beauchamp v. Archer, 58 Cal., 431;
Cardinell v. Bennett, 52 Cal., 476;
McLaughlin v. Pactte, 27 Cal., 451.

In *Williston on Sales* the exact question here involved, and the exact contention made by the respondent, is discussed clearly, logically, conclusively and forcibly at pages 170, 171 and 172. The subject is so clear with especial reference to cases in which the prospective seller has become bankrupt, that we feel justified in asking a reading of it in full. It is directly in line with and amply sustains the petitioner's views.

THE CONTRACT DID NOT CREATE A LIEN.

In the lower court it was contended that the contract between Ikeda and Richardson created an equitable lien in favor of the latter. We submit no lien was created, but even if such be the case, the lien would be but for the amount advanced, and would carry with it no right of possession.

THE CHARACTER OF THE CONTRACT. DELIVERY ESSENTIAL TO TITLE.

There was never any delivery of the hops to the respondent Richardson. There is no evidence whatsoever to sustain any contention as to a delivery of the 141 bales which, in connection with the 216 bales hereinbefore considered, made up the 357 bales. The referee and the District Court so found, and, therefore, attention must be given solely to the said 216 bales.

Contracts such as the one under discussion here may assume two phases: (1) An agreement to sell all of a certain class of goods *when they come into existence,* or (2) an agreement to sell certain goods when they come into existence *when certain things are done after they come into existence.*

The contract in question here is manifestly of the second class; the hops were to be paid for upon delivery after Ikeda had baled and hauled them to the Rideout railroad station, but even if the agreement be of the first class the respondent can not recover; he was not entitled to the hops.

The inspection was made and the 216 bales marked on August 28th, 1909. At that time all the hops contracted for had not been baled, some 141 bales were still in the process of being cured. The agreement was entire and called for 80,000 pounds.

Where an agreement is made to sell goods not in existence, the title does not pass to each particular piece or lot as it comes into existence, but remains in the vendor *until all of the goods to be sold have been completed and delivered.* Thus, a contract for the building of a vessel or other thing not yet *in esse* does not vest any property in the party for whom it is to be constructed or prepared until the entire vessel or other thing is completed and delivered.

Pittsburg, etc., R. Co. v. Heck, 50 Ind., 308;
Low v. Austin, 20 N. Y., 182;
McConibe v. New York & E. R. Co., 20 N. Y., 497;
People, ex rel. Pacific Mail S. S. Co. v. Com's of Taxes, 58 N. Y., 247;
Halterline v. Rice, 62 Barb., 600;
Happy v. Mosher, 47 Barb., 503;
Dyckman v. Valiente, 43 Barb., 142;
Lyman v. Becannow, 29 Mich., 471;
Haney v. Schooner Rosabelle, 20 Wis., 249.

And it makes no difference in the rule that the price is to be paid in installments as the work progresses.

Elliott v. Edwards, 35 N. J. L., 268;
Wright v. Tetlow, 99 Mass., 397.

Or that in addition thereto the construction is under the superintendence of the prospective vendee.

Merritt v. Johnson, 7 Johns, 473, 5 Am. Dec., 289;
Williams v. Jackman, 16 Gray, 514;
Briggs v. A Light Boat, 7 Allen, 287.

Or that there is also a stipulation that the person for whom the thing is constructed shall have a lien for the payments made.

People v. Commissioners of Taxes, 58 N. Y., 242;
Andrews v. Durant, 11 N. Y., 35.

In the case at bar there was no payment made on account of the purchase price; none was contemplated; the money advanced was to remain a *debt,* bearing interest, until the whole 80,000 pounds of hops were delivered, and then, and not until then, was it to be applied upon the purchase price.

The purchase price was not paid and, therefore, no title to the hops passed to the respondent. This is a well settled principle in the law of California, and is well set forth in the case of

Yukon River, etc. Co. v. Gratto, 136 Cal., 538,

Citing,

Clarkson v. Stevens, 106 U. S., 505;
Andrews v. Durant, 11 N. Y., 35,

and approved of in *Benjamin on Sales,* p. 298.

See also:

Hallidie v. Sutter Street R. Co., 63 Cal, 575;
Bacon v. The Poconoket, 67 Fed., 262;
Lang's Appeal, 81 Pa. St., 18;
Coursin's Appeal, 79 Pa. St., 220.

In the foregoing points the agreement between Richardson and Ikeda has been treated as one of the first class (supra), one to sell goods *when they come into existence,* but, as matter of fact, it is one of the second class, one to sell goods *after certain things have been done subsequent to their coming into existence.*

As to the 141 bales there is no question. No attempt to deliver them was ever made. Some of them were even unpacked at the time the 216 bales were marked.

The title passes upon delivery. When it passes and when a delivery is had depends upon the intent of the parties.

Gouser v. Smith, 115 Pa., 452;

and the intent is to be gathered from the surrounding circumstances.

Elger Cotton Cases, 89 U. S., 187.

The parties may determine what act shall be done before the title passes.

Malone v. Minn. Stone Co., 36 Minn., 335.

Thus, when the parties fix some time or the doing of some act, at or upon which the title shall pass it does not pass until that time or the doing of that act.

In the case at bar, under the very terms of the agreement, the hops were to be baled *and after inspection delivered by Ikeda at Rideout station, and were to be paid for on delivery.* The intent that the title should then, and not until then, pass is manifest from the agreement itself.

Where the vendor undertakes to deliver goods at a certain place the title does not pass until delivery, and until delivery they are at the risk of the seller.

Taylor v. Cole, 111 Mass., 363;
Alles v. Voigt, 90 Mich., 125;
De Wolf v. New York Firemen's Ins. Co., 20 Johns, 214;
Ludlow v. Brown, 1 Johns 1, 3 Am. Dec., 277;
McNeal v. Braune, 53 N. J. L., 617;
Braddock Glass Co. v. Irwin, 153 Pa., 440;
Sneather v. Grubbs, 88 Pa., 147;
Hooper v. Chicago & N. R. Co., 27 Wis., 81, 9 Am. Rep., 439;
24 Am. and Eng. Enc. Law, p. 1050.

ANY TRANSFER MADE WAS VOID AS TO CREDITORS OF IKEDA.

The petitioner contends that, even admitting there was a passing of the title to the 216 bales from Ikeda to Richardson, the transfer was void as to

the creditors of Ikeda. There was no such delivery as is required by the law of California.

Our argument so far has been made as if Richardson and Ikeda were the only parties in interest. The petitioner, however, represents the creditors of Ikeda, and as to them the transfer to Richardson was unquestionably void.

Section 3440 of the Civil Code of California, so far as material here, is as follows:

> "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

There are cases which hold that, as a general rule, the trustee succeeds only to the interests of the bankrupt, but these cases do not apply where a code provision, such as that above quoted, is involved.

Remington on Bankruptcy, p. 676,

And the petitioner, as trustee, is entitled to invoke that Code provision.

The evidence clearly shows Ikeda and his employees remained in possession of the 216 bales after they were inspected and marked on August 28th, and exercised the same dominion over them that they did prior to that time. There was no change in the position, location or condition of the hops until after the levy of the attachments and the adjudication of bankruptcy (pp. 20-21).

The Supreme Court of California has often construed this section of the Code.

It has been held that the vendee must take *actual* possession, which must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee.

Sterens v. Irwin, 15 Cal., 503, 506.

Possession is not changed within the contemplation of the statute where vendor or his servants remain in possession of the property the same as before the sale.

McKee S. B. Co. v. Martin, 126 Cal., 557;
O'Kane v. Wheelan, 124 Cal., 200;
Murphy v. Mulgrew, 102 Cal., 547;
Etchepare v. Aguirre, 91 Cal., 288;
Bunting v. Saltz, 84 Cal., 168;
Merrill v. Hurlburt, 63 Cal., 494;

Bell vs. McClellan, 67 Cal., 283;
Godchaux v. Mulford, 26 Cal., 316;
Brugert v. Borchert, 59 Mo., 80;
Mills v. Thompson, 72 Mo., 367;
Doack v. Brubacker, 1 Nev., 218;
Moore v. Kelly, 5 Vt., 34, 26 Am. Dec., 282;
Bump on Fradulent Conveyances (3d ed.), 171.

The mere marking of goods is of no avail if there is no change of possession.

Stewart v. Nelson, 72 Mo., 522, 524.

The goods must either pass to the vendee or the vendor must pass away from them, leaving them in the exclusive possession of the vendee.

Garman v. Cooper, 72 Pa. St., 32.

The possession of the vendee must be exclusive. A concurrent possession with the vendor is not sufficient.

Wordell v. Smith, 1 Camp., 332;
Allen v. Massey, 17 Wall, 351;
Waller v. Cralle, 8 B. Mon., 11;
Plaisted v. Holmes, 58 N. H., 293;
Babb v. Clemson, 10 Serg. & R., 419; S. C. 13 Am. Dec., 684;
Brawn v. Keller, 43 Pa. St., 104;
McKibbin v. Martin, 64 Pa. St., 352;
Miller v. Garman, 69 Pa. St., 134;
Worman v. Kramer, 73 Pa. St., 378;

Stiles v. Shumway, 16 Vt., 435;
Hall v. Parsons, 17 Vt., 271.

ANY DELIVERY OF THE HOPS WAS VOIDABLE AS A PREFERENCE WITHIN SEC. 60 OF THE BANKRUPTCY ACT.

Under the agreement Ikeda was to pay interest on the money advanced by Richardson, *and at the time of the delivery of the hops,* if they were accepted by Richardson, this money was to be considered part of the purchase price. If they were not accepted Ikeda was bound to repay the money advanced. The acceptance of the hops was optional with Richardson. The relation of Richardson to Ikeda on August 28th, when it is contended by the respondent that a delivery was made, was that of a general creditor. This is not a case where there was a specific lien upon some specific property and something done to enforce that lien within four months. We have shown that prior to August 28th Richardson had no rights in the property itself. There was here at the most an antecedent debt or agreement, and an attempt to transfer the property in satisfaction thereof.

Where property is pledged a few days before the filing of a petition in bankruptcy, though in pursuance of a prior agreement to pledge a preference is created.

In re Sheridan, 96 Fed., 406, 3 Am. Bankr. Rep., 554.

A chattel mortgage given within four months prior to bankruptcy in accordance with a prior promise to give security is a preference.

Pollock v. Jones, 61 C. C. A., 555, 124 Fed., 163.

An agreement made at the time a loan was secured to give the lender security upon property to be purchased will not render valid a trust deed given pursuant thereto within four months of bankruptcy.

In re Dismal Swamp Contracting Co., 135 Fed., 415.

A trust deed cannot be considered as relating back and becoming effective as of the date of a contract to give the same.

Morgan v. First National Bank, 76 C. C. A., 236, 145 Fed., 466.

A mortgage or transfer of property within four months of bankruptcy, which otherwise would constitute a peference, is not deprived of that character by the fact that it was executed in a pursuance of a contract to do so made more than four months prior to the filing of the petition. The theory and purpose of the bankruptcy act are to distribute the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy share and share alike among his creditors.

In re Great Western Mfg. Co., 81 C. C. A., 341, 152 Fed. 123;

Vitzthum v. Large, 162 Fed., 685;
In re Mandell, 122 Fed., 127;
Johnson v. Huff, 133 Fed., 704;
In re W. W. Mills Co., 162 Fed., 42;
Torrance v. Bank, 71 Pac. (Kan.), 235;
Bank v. Johnson, 94 N. W. (Neb.), 831.

CONCLUSION.

If we consider the equitable features of this case, it is to be noted that among the creditors of the bankrupt are the laborers whose toil produced the hops. It is the policy of the law of California to give laborers preferred payment for their labor. Richardson, undoubtedly, has a right to share with the general creditors as to the money advanced by him, but he should not under the facts in this case be given all, or the larger part of all the assets, leaving nothing for the other creditors. In law, and in a moral sense, the burden of clearly proving his right to these assets was upon Richardson, and, we submit, this he has not done. To the contrary it clearly appears here, as a matter of law:

That there was no sale of the hops to Richardson.

That Richardson had no lien upon them.

That there was no delivery of the hops to him.

That if there was a sale it was void as to the trustee and as to the creditors of the bankrupt for want of a sufficient delivery, or,

If there was a sale and delivery it was void as a preference under the Bankruptcy Act.

From this it follows that the title to, and right of possession of the hops vested and was in the trustee of the bankrupt, and that the order of the District Court must be reversed and that of the referee sustained.

Respectfully submitted,

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Attorneys for Petitioner.

No. 2207

UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

M. N. WILLIAMSON, Trustee in Bankruptcy of the Estate of George M. Ikeda, Bankrupt,

Petitioner.

vs.

W. M. RICHARDSON,

Respondent.

Respondent's Points and Authorities

The preliminary hearing of this matter was had before J. F. Pullen, Referee in Bankruptcy, December 17, 1909. On April 5, 1912, said Referee filed his findings and conclusions of the law to the effect that M. N. Williamson, Trustee on Bankruptcy of the Estate of George M. Ikeda, Bankrupt, was entitled to 357 bales of hops in controversy. On April 22, 1912, Respondent Richardson filed his petition for review of the order made by the Referee and on June 13, 1912, his Honor, the late Judge DeHaven, caused to be entered his decision and order as follows:

DECISION.

"This is a petition to review an order made by the Referee which determined that the title

to 357 bales of hops was in the trustee of the estate in bankruptcy and denied the petition of the claimant W. M. Richardson for an order directing the trustee to restore to him the possession thereof.

Upon consideration of the evidence and the elaborate briefs filed by the attorneys for the respective parties my conclusion is that the legal title to 216 bales of the hops in controversy was vested in the claimant Richardson on August 28th, 1909, and that he was the owner thereof at the date of the adjudication in bankruptcy, and that the title to the remaining 141 bales is in the trustee.

The order of the Referee is reversed as to the 216 bales of hops owned by the petitioner and affirmed as to the remaining 141 bales."

ORDER.

"The petition for a review of the order of the Referee made herein having been heretofore submittd to the Court for decision, now, after due consideration had, the Court files its written memorandum, and by the Court ordered that said order be, and the same is hereby, reversed as to the 216 bales of hops owned by the petitioner and affirmed as to the remaining 141 bales."

On December 10, 1912, petition for the revision of the decision of the said order and judgment was filed.

STATEMENT OF THE CASE.

On March 3, 1909, George M. Ikeda and W. M. Richardson entered into a contract, which is set forth on pages 13 to 18 of the Petition for Revision. By the terms of this agreement Ikeda unequivocally agreed to sell and Richardson to buy eighty thousand pounds of hops. The agreement further contained provisions obligating Richardson to advance certain portions of the purchase price on specified dates.

On September 20th, 1909, Ikeda filed his petition in bankruptcy.

On the 28th day of August, Respondent Richardson inspected, segregated and accepted 216 bales of hops which were branded and marked "C. S. May & Co., Albany, New York." C. S. May & Co. were consignees to whom Richardson was shipping said hops. The total weight of the bales so inspected and marked was 42,357 pounds which at the contract price would be worth $3,388.56. Prior to the time of such acceptance, Richardson had paid on the purchase price $5,397.75, or about $202.25 less than the contract price of the whole crop of 357 bales.

The 216 bales of hops were rolled in a pile and Richardson requested a man named Dent, who was upon the premises, to look after and care for them until Monday following when

he would remove the hops to the railroad station.

On August 28th, when 216 bales had been segregated, accepted and marked with address of consignee as aforesaid, Richardson intended to return Monday, August 30th, to remove said hops to the railroad station, but when the agents went there for that purpose, they found that the Sheriff of Sutter County had levied an attachment on the hops and prevented their removal by the agents of Richardson. This attachment prevented the removal of said 216 bales by Richardson and also prevented removal of the remaining 141 bales.

Thereafter and before the 20th day of September, 1909, the total crop of hops amounting to 357 bales was inspected and accepted by Richardson.

On September 23rd, 1909, when Williamson seized the hops they were in the possession of Richardson. The whole 357 bales had been removed to the railroad station, part of them having been loaded on cars. The total weight of the crop of 357 bales of hops would be about 70,000 pounds and Richardson had paid to Ikeda all but $202.25 of the stipulated purchase price prior to August 28, 1909, and, but for the attachment by the Sheriff, all of the hops would have been removed from the

premises and loaded on the cars long prior to September 20th.

The contract between Ikeda and Richardson was a crop mortgage valid as against Ikeda and all persons in privity with him, being void only as to creditors and subsequent purchasers. Civil Code Cal., Sec. 2957.

ARGUMENT

Status of Trustee in Bankruptcy

The argument of counsel for petitioner is based throughout on the false assumption that the trustee in bankruptcy occupies the same relative position as a creditor or bona fide purchaser. The trustee in bankruptcy STANDS IN THE SHOES OF THE BANKRUPT and can assert no right nor interpose any defence which would not be available to the bankrupt himself. In a carefully considered case involving claim that the trustee was entitled to all property which could be levied upon or sold under judicial process against the bankrupt.

It was said:

> "In order to arrive at this result, it is assumed that the property in question could have been levied upon and sold under judicial process against the bankrupt, either generally, or because there was no possession in the plaintiff in error, that would make good its claim against creditors of the bankrupt. But

this assumption is not warranted. The goods delivered by the contractor upon the premises, for the purpose of being built into the structure contracted for, were sufficiently in the possession of the owner of the premises to protect the lien, claimed as the result of the understanding between the parties to the contract. * * * The trustee in bankruptcy, seeking by proceeding in law to enforce the title of the bankrupt, to personal property so situated, will be subject to all legal and equitable claims of others, which exist against the bankrupt, not in fraud of the bankrupt law or the rights of general creditors."

Dunlap Silk Co. vs. Spencer, 115 Fed. Rep. 695.

In another case it was held:

"That bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the Court or the Trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the Courts either of common law or chancery. * * * It is so sweeping that, in actions at law brought by assignees in bankruptcy, defendants may prevail on merely equitable defence."

In Re Chase, 124 Fe. Rep. 753.

In the case at bar, the respondent, Richardson, unquestionably had a LIEN ON ALL OF THE HOPS BY VIRTUE OF THE CONTRACT ENTERED INTO BETWEEN THE BANKRUPT AND HIMSELF. The chattel mortgage was not executed in the manner required by law to make it effective against creditors and bona fide purchasers, BUT IT WAS A VALID AND BINDING LIEN AS BETWEEN IKEDA AND WILLIAMSON. This lien affected all of the hops up to the moment of delivery.

Civil Code California, 2957.

Williamson had accepted, marked and segregated 216 bales of the hops and but for the attachment would have removed all of the hops from the premises of Ikeda long before the petition in bankruptcy was filed. The Trustee in Bankruptcy therefore took the hops subject to the general lien of Williamson on all of the 357 bales and to his title based on possession of 216 bales before the attachment was levied.

> "Under the bankruptcy act, when a debtor is adjudged a bankrupt, his entire estate, so far as it is not exempt, is in legal contemplation as effectually brought into custodia legis and appropriated to the payment of his debts as if it were taken in execution or attachment, subject only to the qualification

that, where the act does not specially provide otherwise, as it does in respect of cases affected by fraud, the estate is brought into custodia legis and appropriated *in the same plight and condition that the bankrupt himself held it,* and subject to all the equities imposed upon it in his hands. * * * * but the qualification does not consist in giving effect to proprietary acts of the bankrupt committed after the sequestration of his property, but only to such as were committed prior to the filing of the petition and gave rise to rights in third persons which were valid as between themselves and the bankrupt, and which they were lawfully entitled to assert when the Trustee's title accrued, the ruling, as qualified, being that *the Trustee, in cases unaffected by fraud, takes the property in the same plight and* condition that the bankrupt held it, and therefore subject to the rights of such third persons, *although a creditor levying an execution or attachment thereon would take it discharged of such rights.*"

In Re Youngstrom, 153 Fed. Rep. 104.

Security W. Co. vs. Hand, 19 A. B. R. 295.

Hewitt vs. Berlin, 194 U. S. 296.

Humphrey vs. Tatman, 198 U. S. 91.

York vs. Cassell, 201 U. S. 344.

That the Trustee is not a bona fide purchaser for value is established by

Hewitt vs. Berlin, 194 U. S. 296.
Thompson vs. Fairbank, 196 U. S. 516.
Stewart vs. Platt, 101 U. S. 739.

The Trustee takes no title and has no right which the bankrupt could not assert; in fact he takes only such title as the bankrupt could have transferred *without consideration.*

In Re Dunlop, 19 A. B. R. 368.
Adams vs. Collier, 122 U. S. 382.
Yeatman vs. Savings Inst., 95 U. S. 764.
Gibson vs. Warden, 14 Wall 244.
Cook vs. Tullis, 18 Wall 332.
Mitchell vs. Winslow, 2 Story 630.
Brown vs. Heathcote, 1 Atk. 160.

In Security Co vs. Hand, 19 A. B. R. 295, the Court lays down the rule in the following terse language:

> "It is no new doctrine that the assignee or Trustee in Bankruptcy stands in the shoes of the bankrupt and that the property in his hands, unless otherwise provided in the Bankruptcy Act, is subject to all the equities imposed upon it in the hands of the bankrupt. This has been the rule under former rules and is now the rule."

Applying the foregoing authorities to the facts in the case at bar, it seems very clear that if there was error in the decision of the lamented DeHaven, it was to the favor of petitioner

instead of to his detriment. As to 216 bales of hops, the possession, and hence the title of Williamson, was certainly good *as against Ikeda,* who submitted the hops for inspection, heard the acceptance and consented to the segregation and marking thereof. The error, if there was such, was in denying Richardson title to **all** of the hops when he had paid all but $202.25 of the contract price for the whole crop of 357 bales upon which he had a mortgage lien as against Ikeda, and which would all have been removed from the premises in August but for Ikeda's fault in suffering his creditors to levy an attachment.

PASSING OF TITLE.

Counsel for the Trustee contend that the contract between Ikeda and respondent was merely executory. We do not agree with this contention, but if it be granted that the contract at the time of its execution was such, it had been been fully executed prior to the petition in bankruptcy especially as to the 216 bales of hops. Moreover from the moment the first advance was made on the purchase price, there was a lien on the entire crop to secure repayment of the money in the event that Ikeda for any reason should not deliver.

The petition in bankruptcy was filed on September 20th. On August 28th, Ikeda being present, the respondent examined and accept-

ed 216 bales of hops which were marked and segregated from the remaining hops. All this was done with Ikeda's consent and constituted valid delivery as between Ikeda and Richardson. Mr. Richardson asked Mr. Dent, one of the men employed by Ikeda, to look after the hops and much is made of this as indicating that Ikeda's possession continued. When Ikeda was informed by Richardson that the hops so segregated were accepted, and when Ikeda stood by and watched the hops branded and marked with the name of consignee, there could no longer be contention by Ikeda that there had not been a delivery to Richardson, and if the employee of the seller was specially requested to care for the property and consented to do so this did not result in possession by the employer, who might himself promise to care for the property without such result. Richardson then and there announced that he would remove the hops to the railway station the following Monday, but when his agents went upon the ground for the purpose of removing the 216 bales of hops and the remainder of the crop as fast as it could be baled and accepted, they found that the Sheriff had attached the hops and thus prevented removal from the premises.

This restraint upon Richardson who desired

to remove the hops, and intended to do so, is an element to be considered in determining the question of possession, for when it is considered that but for such restraint, all of the hops would have been removed from the premises three weeks before the petition was filed, it certainly cannot be said that Ikeda remained in possession. The possession of the Sheriff was the possession of Richardson as to Ikeda and his successor, the Trustee. This restraint upon removal could not operate to the favor of Ikeda whose failure to pay, whether through design or misfortune, could not possibly redound to the detriment of Richardson who stood ready to remove all of the hops. The restraint imposed was therefore subject to the right of Richardson to have the hops removed and shipped to his consignee and the delay cannot result in his spoilation. The law will make this restraint the equivalent of removal of all the hops.

Recurring to the main fact, however, there had unquestionably been delivery of 216 bales of hops prior to the attachment.

> "After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the appropriation of specific goods to the contract. The sole element deficient in a

> perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd J. in Rhose vs. Thwaites. 'The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes.' ''

Benjamin on Sales, (2 Am. Ed.) Sec. 358.
Benjamin on Sales, 2 Amer. Ed. Sec. 358.

The reflections of counsel concerning uncertainty of executory contracts of this character are completely neutralized and destroyed as to the 216 bales by the fact that on the 28th day of August, 1909, the purchaser specifically accepted, segregated and marked said hops, thus removing all uncertainty. The contention that the contract provided that Ikeda should deliver the hops to the station, and there could be no delivery unless this was done, is clearly untenable. Richardson could and did waive the performance of this obligation by accepting, segregating and marking the hops upon the ground.

> "But the necessity for performing the condition precedent may be waived by the party in whose favor it is stipu-

> lated, either expressly or by the implication resulting from his acts or conduct. This waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes the other party in fulfilling the condition, or incapicitates himself from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfill the condition. No authority is needed, of course, for the proposition that the party in whose favor the condition has been imposed may expressly waive it."

Benjamin on Sales, page 517.

As far as 216 bales of hops are concerned, Richardson waived the removal of the hops to the railroad by saying through his acts, "I accept and segregate these hops and mark them for shipment to my consignees." Moreover, Ikeda, as to the whole quantity of 357 bales of hops, by failing to pay his creditors prevented the full performance of his contract and neither he nor his successor, the Trustee, can claim benefit, immunity or right because the attachment prevented Richardson from removing the hops to the railroad and thence to C. S. May & Co., consignees.

Counsel seem to contend that possession, and hence title, must be tested by rules which declare what shall constitute possession *as*

against a creditor or an innocent purchaser, but the real test is WHAT WOULD CONSTITUTE POSSESSION AS BETWEEN IKEDA AND RICHARDSON. Section 3440 of the Civil Code of California and authorities thereunder are relied upon as supporting the contention that there was no delivery in this case. It will be observed, however, that this section requires certain acts to render the transfer valid AS AGAINST CREDITORS, but that this does not affect the validity of any delivery consented to or agreed upon as between the parties.

Before proceeding to an examination of the California authorities, we will notice a decision of the Circuit Court of Appeals, which squarely decides the proposition. The issues there were identical with the issues here. The decision reads as follows:

> "Though the agreement was originally executory, being for the sale of lumber to be manufactured, yet, when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus designated. The particular lumber became appropriated to the contract, and the vendee under the agreement was obliged to make his promissory note. The element necessary to a perfect and complete sale was supplied by the appro-

priation of a particular lot of lumber to the contract. * * * NEITHER DID THE PROVISION THAT THE VENDOR SHOULD DELIVER AT CHICAGO PREVENT THE TITLE FROM PASSING BEFORE SUCH DELIVERY. UNDOUBTEDLY, THE GENERAL RULE IS THAT THE SELLER OBLIGATES HIMSELF AS A PART OF HIS CONTRACT TO DELIVER THE PROPERTY TO THE BUYER AT SOME SPECIFIED PLACE, TITLE WILL NOT PASS UNTIL SUCH DELIVERY. (Citing cases). 'Slight evidence,' says Mr. Benjamin, 'is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances.' Benj. Sales, Sec. 329. Here the lumber cut, inspected and measured was completely identified. *Nothing more remained to be done to put it in a deliverable condition. It was then paid for. The delivery might be delayed by the neglect of the seller, or for the convenience of the buyer.*"

McElwee vs. Metropolitan L. Co., 69 Fed. 205.

In that case, the seller under the contract was required to deliver the lumber at Chicago,

in this case he was required to deliver the hops at the railroad station. In that case as in this, the property sold was to be produced and inspected and the decision as above indicated was adverse to the contention of the petitioner in the case at bar.

In another case, the bankrupt prior to filing his petition, had entered into a contract to deliver the output of a certain mill. A few days prior to the adjudication in bankruptcy, claimant demanded the lumber which remained in the yards of the bankrupt lumber company. The trustee contended that this was a preference and resisted the defendant's proof of an additional claim unless it surrendered this lumber; but the court said:

> "There was no suggestion that the contract made between the Lumber Company and Franklin for the purchase of the entire output of Franklin's mills was not a fair one and one that the law would enforce. The contract was still existing at the time of the adjudication and whatever lumber was on hand as the produce of the mill the Lumber Company had a right to claim, provided it complied with the terms which had been agreed upon. If there had been no payment upon the contract of purchase in advance, the Lumber Company would have been entitled to require the Trustee to surrender to it

> the lumber produced at the mill, provided it complied with the terms of purchase. *Having advanced money upon the contract of purchase, the Lumber Company thereby became entitled to at least as much of the products of the mill as it had paid for and it could have recovered so much from the Trustee, even after the bankruptcy.* It is our opinion that at most the taking of the $1000 worth of lumber under a claim by the Lumber Company that it was entitled to that specific property by virtue of the contract of purchase cannot be construed into a payment upon an existing debt such as to constitute a preference under the Bankruptcy Law."

Mills, Trustee vs. Virginia Co., 20 A. B. R. 750

Stelling vs. Jones Lumber Co., 8 A. B. R. 532.

Hanselt vs. Harrison, 105 U. S. 401.

In a case involving questions akin to those involved in this proceeding, the contract provided for the purchase of all the lumber on hand at the seller's mill on the date of the contract and all that the seller should manufacture during six months thereafter. Advance payments of 75% of the value were made under the agreement, but the lumber was piled in the **seller's yards** on the date of his adjudication in bankruptcy. The lumber was

claimed by the Trustee and by the buyer and was awarded to the Trustee by the Bankruptcy Court, but on petition for revision, the Circuit Court of Appeals awarded it to the buyer, saying:

> "There was an undisputed agreement for one party to sell and another to buy. The thing was specially designated, described and segregated, the price was fixed, and payments were made as agreed. Although the agreement may have been to some extent executory, it being for the purchase and sale of all lumber of a certain description 'now on hand at the mill of R. R. Cowan, Cowan, Fla., and all that he will manufacture' during a specified period, yet when the lumber was manufactured and segregated, and the bills of sale, with full details of description, were presented and accepted, and payments made according to contract, there was a complete sale of the property designated in the bills, and the title thereto at once, vested in Baars & Co., and this notwithstanding, under the contract, it remained with Cowan to deliver the lumber at Pensacola and for Baars & Co. to pay the balance of the price, less railroad freight on delivery. As between Cowan and Baars & Co. there does not seem room for question as to the rights of the parties. Of course, on the matter now before us, the Trustee

of Cowan's estate in bankruptcy stands in Cowan's shoes.

The Trustee, however, contends that in the present case the title did not pass, because the delivery was not made, the lumber had not been inspected, and the insurance clause in the six months' contract indicates that the title was to remain in Cowan. * * * However these details may be, the case is clear as to purchase and sale of the property, and in our opinion, the title fully passed."

Baars vs. Mitchell, 154 Fed. 322.

This decision is very pertinent to the case at bar for it effectually disposes of the contention that delivery was not affected until the hops were at the railroad station. It is contended by counsel that the delivery here essential to passing of title was such delivery as would satisfy the requirements of Section 3440 of the Civil Code of California. It is, however, well settled that such a delivery was good as between parties and against all the world except creditors, would be sufficient.

Williams vs. Borgwardt, 119 Cal. 80.

Here, however, there was a delivery sufficient to meet the **very severe test** of Section 3440.

The object of the statute is to give notoriety to sales, by requiring the owner of personal

property to occupy toward it the same relation, and to exercise over it the same control, which is customary in such transactions and under similar circumstances. When creditors are asserting the invalidity of the transfer on the ground of failure to make delivery the terms of the contract between the buyer and seller do not afford the test as to the passing of title. The terms of the agreement between the parties to the sale, and their intent as to passing of title are absolutely immaterial. The essential requirement as between the buyer and creditors of the seller is that *notoriety* shall be given to the transfer of the property. When this has been done the rules that apply where the question is the determination of the party as between buyer and seller, on whom shall fall the loss occasioned by a destruction of the property, have no applicability. In other words, where there have been acts of such character as to indicate a change of ownership, the statute is satisfied and the terms of the contract between buyer and seller have no bearing on the question. The object of the statute is to given those who have extended credit relying on the possession by their debtor of certain personal property, the right to proceed against such property by attachment.

Now, when it comes to determining what

acts constitute a delivery which will be good against creditors, the circumstances of each case and the character of the property transferred must be taken into consideration. The law does not require the same manual delivery to accompany the sale of a cord of wood, which would be essential to the validity of a sale of a diamond.

Counsel have stated that California cases alone must be looked to to ascertain what constitutes delivery and we will meet them on their chosen ground. The leading case pertinent to the case before us is Dubois vs. Spinks, 114 Cal. 292. There the appellants contended that the transfer of certain wood was void as against them for want of an immediate delivery, followed by an actual and continued change of possession, and the Court says:

> "What constitutes an immediate delivery, or an actual and continued change of possession, in the sense of Section 3440 of the Civil Code, is a question of fact to be determined on the evidence; and where, as in this case, the evidence tends to prove such delivery and change of possession, the finding of the Court will not be disturbed."

Proceeding to further consideration of the subject it was further stated:

> "Considering the **ponderous and bulky nature** of the one hundred and

twenty-six cords of wood, it was not necessary to change its situation for the purpose of effecting a delivery of possession (Hutchins vs. Gilchrist, 23 Vt. 86); and, had the order of the acts constituting the whole transaction been reversed, there could have been no question that they constituted an immediate delivery. But since all those acts were done within three and a half consecutive hours, I think that, under the circumstances, the Court may have properly considered the satisfaction and release of the lien held by the Japanese and the delivery of the wood to plaintiff, as parts of the same transaction, and substantially contemporaneous. As soon as practicable after the money loaned by plaintiff was received by the Meyers, Mrs. Meyer paid the demand for which the wood was held in pledge by the Japanese and they released their lien, thus removing all valid objections to plaintiff's rightful possession of the wood."

Dubois vs. Spinks, 114 Cal. 294.

In another case the construction of Section 3440 of the Civil Code was also involved, the question being the sufficiency of delivery of hay in stack. The husband had conveyed certain stacks of hay to his wife and it was contended that there had been no sufficient delivery as against attaching creditors because

the hay had not been removed. The lower Court sustained this contention but the judgment was reversed by the Supreme Court, the Court saying:

> "The Code provides no different rule as to the formality of such transaction between husband and wife, from that required between strangers; yet the law giving a reasonable construction to all such statutes, takes into consideration not only the character of the property, but the relations of the parties and the use of the property intended, and only requires that which would naturally be done in an honest and business-like transaction where there was no thought of fraud of concealment. Indeed, any other course, whilst it might unquestionably fulfill the strictest requirements of the statute touching on actual and continued change of possession, would at once suggest as the reason for such departure an intention to defraud. She was not bound to remove the hay to other land, nor to own the land upon which the stack stood."

Porter vs. Barcher, 98 Cal. 456.
Byrnes vs. Moore, 93 Cal. 394.
Claudius vs. Aguirre, 89 Cal. 503.

O'Brien vs. Ballou, 116 Cal. 320 is an "all fours" with the case at bar. One Bruce was farming about 320 acres of land sown to wheat.

About 60 acres of this land was rented from one Wyman, and the residue which was adjoining, from one Jack. Bruce was indebted to O'Brien for wages and agreed to convey him sufficient of the crop to pay his wages. The proposition was accepted and a bill of sale of all the wheat grown on the sixty acres in the Wyman tract was made to O'Brien. The wheat was harvested, kept separate from that on the Jack ranch and placed in a pile where it was MARKED BY O'BRIEN WITH HIS INITIALS. While in this condition, the wheat was attached by defendant, Ballou, under a writ of attachment against Bruce, who thereafter went into voluntary insolvency. The contention was that the transfer of the crop from Bruce to O'Brien was void under the statute of frauds, the Court in answer to this contention said:

> "The sale passed the title to plaintiff without a delivery of possession. When it was harvested, the ground upon which it was grown was, so far as appears, vacant and unoccupied. The BRAND UPON THE SACKS WAS SUFFICIENT TO NOTIFY THE PUBLIC OF PLAINTIFF'S OWNERSHIP. We attach little importance to the fact that plaintiff was working for Bruce. (Bernal vs. Hovious, 17 Cal. 542; Visher vs. Webster, 13 Cal. 58.) The evi-

dence was sufficient to support the verdict, and on the showing of plaintiff, the contract was not void under the statute of frauds."

O'Brien vs. Ballou, 116 Cal. 320.
Davis vs. McFarlane, 37 Cal. 634.
Raventas vs. Green, 57 Cal 254.
Rosenberg vs. Ross, 6 Cal. App. 759.

In O'Brien vs. Ballou the Court disposed of counsel's contention that as Dent was working for Ikeda, Richardson's request to Dent operated to prevent transfer of possession. The test in all these California authorities clearly points to the proposition that the statute simply requires **sufficient notoriety** to acquaint the general public with the fact that a transfer has been made. That there was sufficient notoriety as far as the 216 bales of hops are concerned is patent. Any one going on the premises would know that the hops had been segregated, accepted and marked and could not fail to understand that they occupied a different position than the unmarked and unbaled hops.

Williston on Sales has been cited in support of counsel's contention. It is sufficient to say of the quotation from Williston, that with all respect due such distinguished authority, the conclusion reached therein is at variance with the conclusions reached by the Federal Court in

Adams vs. Collier, 122 U. S. 382.
Hewitt vs. Berlin, 194 U. S. 296.
McElwee vs. Metropolitan, 69 Fed. 205.
Mills vs. Virginia, 20 A. B. R. 750.
Baars vs. Mitchell, 154 Fed. 322.

and numerous other cases cited in briefs on file.

In Stelling vs. Jones Lumber Co., 2 A. B. R. 532, the Court construed a law of Wisconsin similar to Section 3440 of the Civil Code and is was said that all personal property is not capable of the same sort of possession or delivery and that possession is accomplished when it is such as the nature and character of the property will admit. If actual delivery be not practicable *constructive or formal delivery is sufficient.* In all such cases, the law takes cognizance of the *character of the property, the nature of the transaction, the possession and relation of the parties to the sale and the intended use of the property.*

Counsel makes the point that money paid by Richardson to Ikeda was merely advanced as a loan and was not part of the purchase price. Our answer to this contention is found in

Atchinson Ry. vs. Hurley, 18 A. B. R. 403.

There the bankrupt had agreed to deliver a certain amount of coal at an agreed price. Advances were made by the claimant on the pur-

chase price and it was held:

> "The money paid in advance entitled the Railway Company to an amount of coal which the money so advanced would pay for according to the terms of the original contract * * * We cannot agree with the learned trial Court that the parties intended the advances to be independent transactions disconnected from the original lease and resulting only in simple contract debts or unsecured loans to the coal company. On the contrary, we think, as already stated, that the parties intended to appropriate and secure to the Railway Company sufficient coal when mined to repay the advances made by it." "Does the bankruptcy of the latter company deprive the former of the same remedy against the Trustee? The administration and distribution of the property of bankrupt's is a proceeding in equity and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal, or equitable or both."

Atchinson Ry. vs. Hurley, 18 A. B. R. 403.

There can be no doubt if the hops here in question had not been subject to this contract of sale, and the purchaser had actually paid thereon most of the agreed purchase price and

had marked the hops as Richardson did, the sale would have been good. Certainly the fact that money was advanced to assist the bankrupt in maturing the crop does not change the status of the purchaser.

On the question of preference we think little need be said. There can be no voidable preference where the recipient did not know of the intent to give a preference.

Summerville vs. Stockton, 142 Cal. 529.
In Re Benjamin, 140 Fed. 320.

So far as shown here there was nothing even to put the claimant on inquiry. He had made advances on the hops as required by the contract, and as required by Ikeda. Even had he known that Ikeda was short of money no presumption is raised thereby under the bankruptcy laws that Ikeda was a bankrupt. The subsequent adjudication raises no presumption of prior insolvency.

In Re Chappell, 113 Fed. 545.

The test of bankruptcy is that the bankrupt's property at a fair valuation does not equal his liabilities, not that he shall be short of ready money. Nothing is shown to establish that Ikeda's property at a fair valuation was insufficient to pay his debts. Nothing whatever is introduced in evidence to show knowledge or even to put the claimant on in-

quiry as to Ikeda's condition financially. The evidence resolves itself into this, that Ikeda performed his contract by delivering the hops. And nothing brings out more forcefully the fact that Richardson was not a mere creditor of Ikeda than the fact that he is not put on inquiry by the delivery to him of the hops. Had Ikeda attempted to deliver the hops to his laborers or to the Pioneer Fruit Co., they might have been charged with knowledge that Ikeda's financial condition was doubtful.

Wright vs. Sumpter, 152 Fed. 198.

The payments through all the period from the making of the contract to the delivery of the hops and the actual delivery itself, all form but one transaction, all look to one end. The case in its facts is plainly different from one where loans were made from time to time looking merely to a promise to repay. In the latter case a subsequent payment thereof would be voidable preference, whether made in money or other property, but there is merely one transaction with a number of connected acts. The delivery of the hops was for full and adequate consideration. As was said in Re Newton, 153 Fed. at page 845:

> "The right of claimant in this case did not first come into existence when it took possession of the property in question on the eve of the bankruptcy proceedings. On the con-

> trary, it was secured by the contract which was executed almost a year before, and it is that date which we must regard rather than the date when the possession was taken."

In Mills vs. Virginia, 20 A. B. R. 750, the Circuit Court of Appeals held that a claimant was entitled to recover from the Trustee all goods that the claimant had paid for under a contract similar to the one here in question, and that, consequently, deliveries that the bankrupt had already made could not be construed as preferences.

It may be that counsel is confused by certain cases in which the Court has permitted the Trustee, by order made before the appointment of the trustee, to be subrogated to the rights of execution creditors. No such action has been taken here and it is now too late for such action to be taken. We quote from Davis vs. Crompton (supra):

> "It only remains to consider the remaining contention of the appellant, that he has been subrogated by the Court below to the rights of the Chautaqua Worsted Mills, plaintiff in a judgment and execution levied upon the property in question, August 29, 1905. As to this we cannot do better than quote again the language of the learned Referee:
>
> "'Under Sec. 67F of the bankrupt

law it is provided that "all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt." In this case the Chautaqua Worsted Mills entered judgment and issued execution and levied upon the property on August 29, 1906. The petition in bankruptcy was filed in September 7, 1906, whereby the judgment and levy obtained through the legal proceedings in the State Court, became null and void upon the subsequent adjudication of the bankrupt on October 15, 1906. Sec. 67F further provides that "the property affected by levy, judgment, attachment or other liens shall be deemed wholly discharged and released from the same and shall pass to the Trustee as a part of the estate of the bankrupt." By the subsequent proceedings in bankruptcy, therefor, the lien of the Chautaqua Worsted Mills was destroyed. The receiver having obtained a restraining order from the District Court, took possession of the property from the Sheriff and in so taking it took it wholly discharged and released from the lien of the levy. Now, Section 67F further provides that such lien shall be deemed wholly dis-

charged and released "unless the Court shall on due notice order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the Trustee for the benefit of the estate aforesaid." The Trustee did not attempt to preserve this lien. It was the receiver, who, through the restraining order, obtained possession of the property discharged of the lien; no proceedings were taken to preserve this lien, and it was not until April 4, 1907, in the midst of the controversy arising between the conditional vendor (claimant herein) and the Trustee that the Trustee filed a petition praying to be subrogated to the rights of the execution creditors; upon which petition an order of subrogation was entered. An examination of the record shows that the execution creditors no longer had any rights at the time the order of subrogation was made, and therefore, the Trustee took nothing by virtue of said order.'

Concurring as we do in these views it is not necessary to consider whether, if the order of subrogation had been made in time, the bankrupt's estate would have been benefitted thereby; nor are we called upon to say how such a lien, obtained by a single creditor,

could be prevented for the benefit of the creditors at large; nor at what time or by what process such suborgation can be effected.

We have not thought it necessary to analyze the numerous authorities referred to by counsel. We think we have already shown that the decision of the Supreme Court of the United States in York Mfg. Co vs. Cassell is controlling in this case and the respondent is entitled to all of this property as against the Trustee in bankruptcy.

Counsel have collated many authorities from other states. Some of the propositions announced, such as concurrent possession by vendor and vendee, we do not dispute. We have heretofore noticed the contention that Ikeda was in possession because Dent, his employee, was asked to look after the hops until Monday, when Richardson would remove them, and we think this court will say with the Supreme Court of California, "we attach little importance to the fact that (Dent) was working for (Ikeda)."

We have not taken the time to discuss each authority separately and will content ourselves with the suggestion that cases cited in this brief, together with cases cited in other briefs on file, show conclusively that decisions of the Federal Courts and the Supreme Court of California are unanimous in their repudia-

tion of counsel's argument that there was no sufficient delivery as to the 216 bales of hops. The authorities cited touching preference are wide of the mark. There was no preference in this case. The contract was made in March, 1909. The advances upon the purchase price were for the specific purpose of enabling Ikeda to mature this crop and Richardson had advanced practically all of the purchase price of the entire crop prior to August 28th, 1909, and the segregation, acceptance, marking and consequent delivery of 216 bales of the hops on that date was in line with the contract. There is no hint whatever of any preference. Creditors certainly were not injured, for had it not been for the money advanced upon the purchase price, there would have been no crop.

Counsel's plea for the creditors upon the equitable feature of the action falls flat when this suggestion is given due weight. Richardson had supplied ample money to pay laborers and everyone connected with the cultivation and maturing of this crop. The equities are all his way and he is protected by the law as declared by the Federal Courts and the Courts of the State of California. There was a delivery of 216 bales of hops to Richardson long prior to the commencement of the proceedings in bankruptcy and hence the

Trustee, who must rely upon the title and rights of the bankrupt cannot invoke the rights of creditors, even if their equities conflict with the rights of the respondent.

We submit that if there is to be revision of the decision that revision should result in awarding the entire 357 bales of hops to Richardson, or at least enough of the hops at the contract price to reimburse moneys advanced upon the purchase price.

In concluding, we ask the Court to examine the other briefs on file in behalf of Richardson, the respondent here, as many authorities not herein mentioned are cited. The case was fully and completely argued in briefs submitted to the Referee and considered by Judge De Haven, and we suggest that argument in said briefs contained may be more helpful than this brief.

We respectfully submit that the decision of Judge DeHaven should be affirmed and that, if revision of said decision is to be had, it should result in awarding respondent the entire crop upon his payment to the Trustee of the sum of $202.25 remaining due thereon under the contract.

Respectfully submitted,

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White, Miller & McLaughlin,
Attorney for Respondent.

No. 2207

UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

M. N. WILLIAMSON, Trustee in Bankruptcy of the Estate of George M. Ikeda, Bankrupt,

Petitioner,

vs.

W. M. RICHARDSON,

Respondent.

PETITIONER'S POINTS AND AUTHORITIES IN REPLY.

The respondent takes the position, and contends:

1. That the trustee in bankruptcy stands in the shoes of the bankrupt and can assert no right nor interpose any defense which would not be available to the bankrupt himself.

2. That the respondent had a lien, as between Ikeda and himself, on all the hops.

3. That except in cases of fraud, etc., the estate of a bankrupt is brought into court and appropriated in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in his hands.

4. That the trustee takes no title and has no right which the bankrupt himself could not assert; that he takes only such title as the bankrupt could have transferred without consideration.

5. That the contract between the respondent and Ikeda was not executory merely, but with the subsequent acts of the parties, passed the title to all the hops to the respondent.

6. That at least 216 bales of the hops had been delivered to the respondent prior to the adjudication of bankruptcy.

7. That Section 3440 of the Civil Code of California does not apply, because the transaction in question should not be judged by the standard by which a transaction is judged when effecting creditors, but by the standard used between the parties.

8. That, even if the Civil Code section does apply there was a delivery sufficient to meet the requirements of that section.

9. That the money paid Ikeda by the respondent under the contract was not an advance, but the payment of the purchase price.

10. That there can be no preference where the recipient did not know of the intent to give it.

The whole argument of the respondent is based upon the assumption that the contract between Richardson and Ikeda constituted a sale of the hops; that the money paid by Richardson to Ikeda was parts of the purchase price and not a loan or advancement, and that, therefore, the title had passed to the respondent prior to the adjudication of bankruptcy. This is shown by his opening statement of facts. He there states that by the contract of March 3d, 1909, "*Ikeda unequivocally agreed to sell and Richardson to buy.*" That "*the agreement further*

contained provisions obligating Richardson to advance certain portions of the purchase price." The contract does not contain such language. This is merely the respondent's construction of it. The contract is set out in full in the petition for revision and speaks for itself. The petitioner's construction of it, and by which construction the contract does not constitute a sale, but is a mere executory agreement, is given, with the authorities to support it, in the plaintiff's Points and Authorities now on file, and we will here but refer to it.

Again the respondent's position and contentions rest upon the rule that a trustee succeeds only to the interest of the bankrupt, and does not succeed to the rights of the creditors or take any of the remedies given to the creditors by statute.

While this may have been the rule under the Bankruptcy Act of 1867, and is probably the rule where there are no attaching creditors or creditors who may invoke the remedy given, it is clearly not the rule in a case such as this where there are attaching creditors and where there is in force a statute such as Section 3440 of the Civil Code of California.

> "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the prop-

erty, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, *and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself,* and against purchasers or encumbrancers in good faith subsequent to the transfer."

The statute here expressly gives a right to the remedy—makes the transfer void as to the trustee —for it cannot be said that he is not a successor in interest of the creditors, or one upon whom the estate of Ikeda devolved in trust for the benefit of others than himself.

Not only by this statute of California is the right conferred on the trustee, but it is also expressly conferred upon him by the Bankruptcy Acts itself.

Bankruptcy Act of 1898, Sec. 70a.
Remington on Bankruptcy, p. 676.

In speaking of this section of the Act, Mr. Justice Peckham has said:

"By Section 70a the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon

and sold by judicial process against him; and by subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same."

Security Warehousing Co. v. Hand, 19 A. B. R. 291 (298).

TITLE TAKEN BY THE TRUSTEE.

In his argument that the trustee stands in the shoes of the bankrupt and can exercise no right that the bankrupt himself could not have exercised, the learned counsel for the respondent has entirely ignored the foregoing, and all the cases cited by him under this head are cases in which no such right was given by statute or cases whose peculiar circumstances, such as the non-existence of creditors who could invoke the remedy, took them out of the operation of the rule.

Of the cases cited by the respondent on this point:

Dunlap Silk Co. vs. Spencer, 115 Fed. 695, involved the construction of an ordinary building contract with provision that in case of abandonment by the contractors, the owner might proceed to complete the work with the materials on hand, and it was held that the materials delivered on the job were already

in possession of the owner, and that neither the contractor nor his creditors could have in law or equity siezed or prevented their use in the completion of the building.

In *re Chase,* 124 Fed., 753, the bankrupt before the adjudication made an assignment for the benefit of creditors. The assignee paid out certain moneys for the benefit and preservation of the estate, and it was held that he had a preferred claim therefor on the ground that the value of the property had been enhanced by the expenditure, and that the assignment was, in legal effect, the same as the appointment of a receiver.

In *re Youngstrom,* 153 Fed. 104, the question was the setting aside of a homestead to the family of the bankrupt as exempt property. The homestead was not properly selected nor exempt under the state law, and therefore held not exempt under the Bankruptcy Act.

In *Security W. Co. vs. Hand,* 19 A. B. R., 295 (U. S. Sup. Ct.), there was a question of actual fraud. A field warehouse company, being one having no warehouse but issuing certificates for goods left in the possession and on the place of the bailor, it was held that such receipts were not negotiable, and under the law of Wisconsin their assignment did not amount to a delivery of the goods nor vest any title in the assignee of the certificates.

In *Hewitt vs. Berlin,* 194 U. S., 296, there was a sale of property to the bankrupt upon condition that the title should not pass until the property was paid

for and, as such conditional sale was valid under the law of New York, it was held good as against the trustee because good against the bankrupt.

York vs. Cassel, 201 U. S., 344, involved the same question.

In *re Dunlap,* 19 A. B. R., 368, involved a conditional sale under the laws of the state of Minnesota, which provide that a contract of such sale must be recorded or it is voidable by attachment creditors, judgment creditors and bona fide purchasers only, and there were no such creditors or purchasers in that case.

In both *Humphrey vs. Tatman,* 198 U. S., 91, and *Thompson vs. Fairbank,* 196 U. S., 516, the question was the rights of a mortgagee who had taken possession of mortgaged property before the filing of the petition in bankruptcy. The mortgagee was held entitled to hold against the trustee because under the laws of the state where the mortgage was made such taking of possession related back to the date of the mortgage.

Stewart vs. Platt, 101 U. S., 739, arose under the Bankruptcy Act of 1867, and involved a chattle mortgage good as between the parties but void as to creditors. It was held that the creditors were entitled to payment, and the mortgagee to any balance remaining.

Adams vs. Collier, 122 U. S., 382, arose under the old Bankruptcy Act, and holds that an assignee cannot assail a voluntary conveyance unless voidable

for fraud, and it was found there was no fraud in that case.

Yeatman vs. Savings Institution, 95 U. S., 764, was also under the old Act, and merely holds that a pledgee holding under a valid pledge was not guilty of conversion by refusing to surrender the pledged property to the assignee in bankruptcy.

Gibson vs. Warden, 14 Wall., 242, also under the old Act, merely construes the two classes of persons mentioned in Section 35 of that Act.

Cook vs. Tullis, 18 Wal., 332, involved the proceeds of trust property which, of course, the assignee did not take.

Mitchell vs. Winslow, 2 Story, 630, and *Brown vs. Heathcote,* 1 Atk., 160, were under statutes entirely different from those involved here.

Counsel for the respondent says (p. 9) that, applying these authorities to the case at bar, it is clear the trustee had no enforcible rights to the hops. We submit that a mere glance at the cases show they have absolutely no application to the facts of this case. In every one of the cases cited there was the application of a statute entirely different from those governing here or such peculiar facts and conditions that the bankrupt himself had no legal title at the time of the adjudication, and that under the authorities cited in the petitioner's points and authorities it must be held that the title to the hops passed to the trustee.

THE PASSING OF TITLE FROM IKEDA TO RICHARDSON.

Whether or not the respondent Richardson ever took any title to the hops depends upon the construction of the contract between Ikeda and Richardson.

This question is discussed at length in the Petitioner's Points and Authorities (p. 5 *et. seq.*) where it is shown that the contract did not constitute a sale, but was only an executory agreement of sale. The respondent's position cannot be sustained unless it be found that there was a sale at the time the contract was made and the intent then was that the title should pass to Richardson.

We will not again go over the ground covered in the points and authorities before presented, but by the contract:

Richardson agrees to pay upon delivery. He has a right of rejection. Delivery is to be made at the railroad station. The moneys Richardson advanced were at the time of the delivery of said hops to be deemed part payment of the purchase price. If the hops were not delivered Richardson was to be repaid the advances with interest.

Take this contract and apply to it the old familiar test: Had the hops been destroyed before Richardson had accepted and received them, upon whom would the loss have fallen? That party had the title. We have no doubt had that event occurred counsel would have advised, and rightly so, Richardson to have refused to stand the loss.

In all of the cases cited by the respondent upon

this point the Court found there had been an actual sale and passing of title.

Benjamin on Sales is cited to show that an agreement of sale may be made in two separate parts, and that a condition as to delivery may be waived by party for whose benefit it is made. There is no question of these legal propositions, but they do not apply to the facts in this case.

Counsel's statement that Richardson was to return and haul the hops to the station, and that he thereby waived the condition of delivery is not borne out by the record. At page 19 of the petition for revision we find the following:

"4. At three o'clock in the afternoon of said 28th day of August, 1909, Richardson and his agent, Koch, left the Rideout Ranch. It was the understanding at that time that they should return on the following Monday, *and that some of the bales of hops at that time should be hauled to the Rideout Station BY IKEDA.*"

On page 20 there appears this testimony of the agent of the respondent:

"Q. When you and Mr. Richardson went over, your intention was to inspect the hops as you have testified, and then go back on Monday and haul them from the ranch to the depot; is that right?

"A. Well, we never—

"Q. Have them hauled?

"A. Yes, sir—well, we won't haul them. It is the grower's place to haul the hops."

In *McElwee vs. Metropolitan L. Co.,* 69 Fed., 302,

a contract was made between the bankrupt and the lumber company, by which the bankrupt bought all the lumber manufactured at a certain mill during a certain period, with provision that on the first of each month all the lumber manufactured during the preceding month should be shipped to the bankrupt on his giving ninety-day notes in payment therefor, and further provision that if the bankrupt did not desire to take the lumber as fast as manufactured he might renew his notes as long as the lumber remained in the maker's possession, but not to exceed ninety days. The Court held the makers had a vendor's lien on the lumber while in their possession, and, therefore, the question whether or not the title had passed was immaterial.

In *Mills vs. Virginia, etc. Co.,* 20 A. B. R., 750, the bankrupt borrowed $750, for which he gave notes and a deed of trust; he also contracted with the payee to purchase certain lumber, and on the strength thereof was advanced $950, for which there was no security. This all happened within four months of the adjudication. Within a few days prior thereto the payee of the notes took from the bankrupt about $1000 worth of lumber. It was contended that in so doing the payee accepted a preference so as to bar a claim for the $750. The ruling was against this contention.

Stelling vs. Jones Lumber Co., 8 A. B. R., 521, was a suit in the nature of an equitable replevin by a trustee in bankruptcy against a third person. It involved a question of what constitutes manual de-

livery under the law of Wisconsin. Under the peculiar circumstances of the case it was held that under the contract in controversy it was the intent of the parties that title should pass absolutely, and that there was sufficient delivery.

Hauslet vs. Harrison, 105 U. S. 401, was under Act of 1867, and it was held that the contract involved constituted an equitable mortgage and was not tainted with fraud.

In *Baars vs. Mitchell,* 154 Fed., 322, the Court found that there was an actual and complete sale of the property and vesting of the title and an actual payment of 75 per cent of the purchase price.

In *Williams vs. Borgwaldt,* 119 Cal., 80, certain sheep were attached as belonging to a vendor. The vendee effected a compromise and took possession of the sheep. After this another attachment was levied for a debt of the vendor, and it was held that the vendee, being then in possession, the attachment would not hold.

DELIVERY UNDER THE CALIFORNIA STATUTE.

The respondent contends that in this case there was such a delivery of the 216 bales by the inspection and marking prior to the attachments and adjudication of Ikeda's bankruptcy, as will meet the requirements of the Civil Code, Section 3440.

Counsel's argument cannot be disputed, but again it is not supported by either facts or the law, and the cases cited were based upon such peculiar facts

and circumstances that they cannot be held to apply to this case.

We agree with counsel that each case must be judged in view of its own peculiar facts and circumstances.

Here there was nothing done towards a delivery except an inspection of some of the hops, a marking of some of the bales inspected and an understanding that they *were to be delivered* the following Monday. Under the contract Richardson had a right of inspection before determining whether or not he would buy. If he accepted Ikeda was to deliver at the depot and then the price became due. As shown above, Richardson intended to exact performance of the agreement of Ikeda to haul to the station, and is it not the most reasonable construction that the marking was intended as evidence of acceptance or approval, and never was intended as evidence of a delivery? The delivery was to be made the following Monday.

In view of these facts and circumstances of the case the decisions cited by the respondent can all be distinguished and, therefore, do not apply.

Dubois vs. Spinks, 114 Cal., 292, is stated by the learned counsel for the respondent to be a leading case upon the subject. In that case there was a conflict in the evidence as to the delivery. The language quoted on page 22 of the respondent's brief shows this to be the principal ground of the Court's ruling. One hundred and twenty-six cords of wood were involved, and all the acts of sale and delivery were

had within a space of about three hours. We fail to see how this case can be of comfort to the respondent, but to the contrary, by analogy, it sustains the petitioner's position.

Porter vs. Bucher, 98 Cal., 456, involved a sale of hay by one joint tenant to another, and the holding is that such joint tenant, in taking possession, was not required to remove the hay from the land.

Byrnes vs. Moore, 93 Cal., 394, merely decided that the granting of a motion for a non-suit was erroneous, there being some evidence tending to show a delivery.

In *Claudius vs. Aguirre,* 89 Cal., 503, the lower Court found upon conflicting evidence that there had been the necessary change of possession, and, under the long established rule, the Supreme Court refused to review the question.

O'Brien vs. Ballou, 116 Cal., 320, is stated by the respondent, at page 24 of his brief, "to be a case on all fours with the case at bar." Counsel again assumes that in the case at bar there was an actual sale and delivery by *Ikeda* to *Richardson,* otherwise the O'Brien case cannot apply. In that case a growing crop was the subject of the sale, and by counsel's own comments and quotation from the decision it is clear there was an actual sale. It was not a contract to sell something, but an actual sale of all wheat grown upon a particular piece of land, which was not in the possession of the vendor, and after the sale the vendee harvested the wheat as his own

and thereafter exercised such dominion over it as is usual in such cases.

Davis vs. McFarlane, 37 Cal., 634; *Raventas vs. Green,* 57 Cal., 254; *Rosenberg vs. Ross,* 6 Cal. App. 759, and *Sommerville vs. Stockton,* 142 Cal., 529, each involved the delivery of a growing crop. Growing crops are of necessity governed by a different rule, actual manual delivery being impossible, but in each of these cases there was some acts of delivery.

On page 26 of the respondent's points and authorities the section from *Williston on Sales,* quoted in the plaintiff's points and authorities, is criticised and stated to be contrary to decisions of the United States Supreme and other Federal Courts. We have hereinbefore reviewed each of these decisions and shown that insofar as they have any tendency to hold against the rule laid down by Mr. Williston they are governed by peculiar facts and circumstances which take them out of the general rule, or by some special statutory provision, and we again submit the text from Williston as the latest expression of any eminent writer upon the subject.

THE MONEY ADVANCED TO IKEDA WAS NOT THE PURCHASE PRICE.

The respondent contends that Richardson, in paying certain moneys over to Ikeda, did not make advances, but paid the same on account of the purchase price of the hops. There can be no question but that these moneys were paid pursuant to the contract.

The provisions of the contract regarding these moneys are found on pages 15 and 16 of the petition for revision. Richardson agrees *to advance—at the time of delivery, the money advanced is to be applied on the purchase price. The money advanced shall bear interest. If the hops are not accepted it shall be repaid, etc.* Do these provisions in any way sustain the proposition that these moneys were payments on account of the purchase price? Do they not bear all the earmarks of advancements or loans?

Atchison, etc. R. Co. vs. Hurley, 18 A. B. R., 403, is cited as showing these moneys to have been paid on the purchase price. We can find nothing in the case in any way tending to throw light on the subject. That case involvel a contract which was assumed by the trustee, and the holding is that if the trustee assumes, he must assume it *cum onere* subject to all its provisions and conditions. The trustee assumed a contract under which a railroad company advanced money for the mining of coal, and for which it was to receive coal sufficient to cover the amount.

THE SUBJECT OF PREFERENCE.

Upon this subject we will rest content with what is said in the petitioner's points and authorities now on file. All that is said by respondent's counsel is based upon the assumption that the title to the hops was vested in Richardson; that his contract with Ikeda was and constituted a present sale, and such

must be found to be the fact before any of the authorities cited by him under this head can apply. If such is not the fact they have no reference to this case.

CONCLUSION.

As we said in opening these points and authorities, the respondent bases his whole case, as he in fact must, upon the assumption that there was an executed and completed sale of the hops from Ikeda to Richardson prior to the adjudication of the bankruptcy of Ikeda. We have reviewed every case cited by him and have shown it has no application whatever to this case unless the fact of such a sale has been established. We feel justified in saying we have here and in the petitioner's points and authorities on file demonstrated that no such sale existed; that Richardson had no title to the hops; that the title was in the bankrupt and hence vested in the petitioner, the trustee, and this being the case the judgment of the District Court must be reversed and that of the referee sustained.

Respectfully submitted,

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